(1) 06157 2007

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

EM LTD. AND NML CAPITAL, LTD.,

Petitioners,

v.

REPUBLIC OF ARGENTINA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The overarching issue presented is whether a debtor nation may prevent the attachment by its creditors of assets nominally held by its central bank when the nation has, by presidential decree, elected to make those assets available to the nation for the early, selective, and voluntary repayment in full of a debt to a particular creditor. Underlying that question are four subsidiary issues, each of exceptional importance:

(1) Is the general rule recognized in *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), and in the legislative history of the Foreign Sovereign Immunities Act—that borrowing and repayment of money are types of commercial activities—subject to an exception if the lender lends only to sovereigns, as the court of appeals held?

(2) Does the sovereign's designation of assets in the United States (along with other assets elsewhere) by presidential decree for use in repaying a debt constitute "use" of those assets for a commercial activity in the United States?

(3) When a foreign sovereign directs its central bank to repay one of the sovereign's debts, and provides the central bank a note obligating the sovereign to repay the central bank for the assets so used (thereby recognizing that the sovereign is using assets previously not its own), has the sovereign converted those assets to its own assets sufficiently to make them available to pay the sovereign's valid debts, including debts it would prefer not to pay, such as those of petitioners?

(4) When a judicial decision rests in part on the plaintiffs' alleged failure to present evidence concerning a foreign debtor's assertion that certain assets are immune from attachment, is it legal error and a violation of due process to deny the discovery normally afforded plaintiffs on the very issues on which the court said plaintiffs had not submitted evidence?

PARTIES TO THE PROCEEDING

The petitioners, plaintiffs-appellants below, are EM Ltd. and NML Capital, Ltd.

The respondent, defendant-appellee below, is the Republic of Argentina.

Banco Central de la República Argentina was designated an "Interested Non-Party Appellee" in the court of appeals. Because Rule 12.6 of the Rules of this Court indicates that all "parties" in the court below, other than petitioners, are considered respondents, and because the bank was expressly designated a "Non-Party" below, it appears that the bank is not formally a respondent in this Court. Nevertheless, petitioners are serving this petition on the bank as if it were a respondent, and petitioners do not object to the bank's filing of briefs in this Court as if it were a respondent.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, EM Ltd. states that it has no corporate parent and that no publicly held company owns more than 10% of its stock.

Pursuant to Rule 29.6 of the Rules of this Court, NML Capital, Ltd. states that it has no corporate parent and that no publicly held company owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 473 F.3d 463. The district court's written order (App., *infra*, 41a-45a) and oral opinion (*id.* at 103a-111a) vacating the restraining notices and orders of attachment entered on behalf of petitioners are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2007. The court of appeals denied rehearing and rehearing *en banc* in three separate orders (App., *infra*, 114a-119a) respectively entered on February 20, 22, and 27, 2007. On May 4, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 29. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 1609-1611, are set forth at App., *infra*, 123a-129a.

STATEMENT

Petitioners EM Ltd. ("EM") and NML Capital, Ltd. ("NML"), creditors of Argentina as bondholders of defaulted Argentine debt, sought to obtain post- and pre-judgment attachment, respectively, of $105 million in funds that they contend are property of the Republic of Argentina. The attachments were necessary because Argentina removed other assets from the United States in anticipation of and following its default on billions of dollars of external debt. The funds in question are held in accounts of the Banco Central de la República Argentina ("BCRA" or the "Central Bank") on deposit at the Federal Reserve Bank of New York.

The attached funds are a subset of assets that Argentina unilaterally designated, by way of two presidential decrees, for

its own use to make an early repayment of Argentina's debt to the International Monetary Fund ("IMF"). The decrees allocating those funds were quickly followed by a governmental resolution requiring Argentina to pay back the Central Bank for the funds allocated and used by Argentina. Despite that conduct, the Second Circuit held not only that the attached funds were not Argentina's property—and thus not subject to attachment under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*—but also that petitioners were not entitled to discovery to show that they were.

A. Argentina's Default on its Foreign Debt and Petitioners' Initiation of These Lawsuits

Since October 2003, EM has held a judgment of more than $700 million against Argentina based on Argentina's default on certain bonds. After the Second Circuit affirmed that judgment, *EM Ltd.* v. *Republic of Argentina*, 382 F.3d 291 (2004), it became final and non-appealable on November 30, 2004. Similarly, NML has a judgment of more than $280 million on defaulted Argentine bonds, and has pending claims on bonds worth hundreds of millions of dollars more. There is no legitimate dispute that Argentina owes that face value plus very substantial interest. See *NML Capital, Ltd.* v. *Republic of Argentina*, 2006 WL 1294853 (S.D.N.Y. May 10, 2006) (granting NML summary judgment while Second Circuit appeal was pending on attachment orders).

These recovery efforts arise from Argentina's refusal to make scheduled payments on billions of dollars of external debt. After declaring a moratorium on servicing that debt in 2001, Argentina restructured it in 2005 through a paltry exchange offer that 24% of bondholders, including petitioners, did not accept (an unusually high non-acceptance rate for a sovereign debt restructuring). Argentina made it clear that it had no intention to offer anything to bondholders that did not accept its exchange offer. Argentina also continued a longstanding effort to secrete and shield its assets to prevent bondholders from using legal process to obtain the amounts they are owed. Thus,

in February 2004, Argentina's Cabinet Chief "confirmed that the assets of the country are safe from threat of attachments requested by foreign creditors." App., *infra*, 149a; see also *ibid.* (reporting that the "[r]eserves of the [Central Bank] on deposit in New York banks have been withdrawn, funds on deposit in the New York branch of Banco Nacion have been repatriated, and salaries of Argentine officials posted to other countries are being deposited in Argentina or paid in the form of cash sent via diplomatic pouch, which has immunity").

Just six months after Argentina paid off some creditors for cents on the dollar and told others to expect nothing, Argentina considered its financial situation sound enough to allow it to repay its entire $9.6 billion IMF debt ahead of schedule. To that end, President Néstor Kirchner issued two decrees on December 15, 2005 ("the Decrees"). The Decrees "allocated" all reserves held by BCRA, in excess of those necessary to back the monetary base, "for the payment of obligations" Argentina owed to multilateral lenders, including the IMF. App., *infra*, 130a-141a. The Decrees did not earmark specific reserves held by the Central Bank in any particular country, but instead created a new legal category—"Unrestricted Reserves"—to denominate all of the funds allocated, a total of approximately $8.4 billion at the time. *Id.* at 8a n.4.

The second Decree confirmed that "the current level of international reserves amply exceeds the margins necessary to maintain appropriate monetary and exchange policies" and ordered "payment of the pending debt to the [IMF]." App., *infra*, 137a. Accordingly, it "instructed" Argentina's Ministry of Economy and Production "to make, through [BCRA], full payment of the debt undertaken with the [IMF], using the aforementioned reserves." *Ibid.*

Subsequently, on December 29, 2005, the Ministry of Economy and Production issued Resolution No. 49, which directed that a nontransferable note be issued to the BCRA obligating Argentina to repay the Central Bank for the reserves the nation directed be used to repay Argentina's debt to the IMF. App.,

infra, 9a. Resolution 49 noted that it was "advisable to settle [Argentina's] liabilities * * * stemming from" its use of these Central Bank funds. *Id.* at 144a.

B. Petitioners' Efforts to Attach and Restrain Argentina's "Unrestricted Reserves" in New York

Shortly after President Kirchner issued the Decrees, it was reported in the press that Argentina planned to repay its IMF debt on January 3, 2006. On December 30, 2005, before any repayment occurred, petitioners sought to secure their ability to recover on their legal claims arising from Argentina's default. Specifically, petitioners sought to encumber funds held for Argentina by the Central Bank in financial institutions in New York City. Because it turned out that the only substantial BCRA assets held at financial institutions in New York City were in accounts at the Federal Reserve Bank of New York, we refer to the $105 million in attached funds as "FRBNY funds." See App., *infra*, 3a.

Petitioners argued that the Decrees had first appropriated (or borrowed) the Central Bank's funds in excess of funds necessary to support the monetary base, and then directed that those Unrestricted Reserves be used by Argentina, preferentially, to repay one of the nation's creditors—the IMF—to the detriment of other creditors. Accordingly, the Unrestricted Reserves qualified as "property" of Argentina subject to attachment under New York law (and thus under Fed. R. Civ. P. 64).

Petitioners also argued that the FSIA did not shield the FRBNY funds. Under Section 1609 of the FSIA, a foreign state's property "shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." Both of those exceptions, petitioners contended, authorized attachment of Argentina's Unrestricted Reserves. First, execution was permitted under Section 1611, which provides that "property of a foreign state shall be immune from attachment and execution if – (1) the property is that of a foreign central bank or monetary authority *held for its own*

account." 28 U.S.C. § 1611(b)(1) (emphasis added). Section 1611(b) presented no barrier to attachment, petitioners contended, because the Unrestricted Reserves were no longer being held by the Central Bank "for its own account" and instead were appropriated or borrowed by Argentina with directions that they be used to pay off Argentina's IMF debt.

Second, execution was also permitted by Section 1610(a) and (d), which state:

> The property [in the United States] of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment * * * if – (1) the foreign state has [explicitly] waived its immunity from attachment * * *.

28 U.S.C. § 1610(a), (d) (concerning post- and pre-judgment attachment, respectively). Petitioners contended that Argentina expressly waived its immunity from attachment in the governing debt instruments. Because all of BCRA's funds in excess of those necessary to support the monetary base were allocated by Argentina to repay multilateral lenders, petitioners contended, those funds were Argentina's "property * * * used for a commercial activity in the United States" under Section 1610.

On December 30, 2005, the district court issued multiple *ex parte* orders of attachment in favor of NML and multiple restraining notices in favor of EM—all directed to property of Argentina, including property held through the Central Bank. On January 3, 2006, with the FRBNY funds already attached, Argentina repaid the IMF in full from funds held elsewhere.

C. The District Court's Orders Vacating the Attachments and Restraining Orders

On January 6, 2006, both Argentina and the Central Bank moved to vacate the December 30 orders. Among other things, they contended that the Unrestricted Reserves (1) were BCRA property "held for its own account" under Section 1611(b)(1), even though Argentina was obligated to repay BCRA for using those funds; and (2) were not "used for a commercial activity in

the United States" under 28 U.S.C. § 1610, even though they had been designated for use to pay off one of Argentina's creditors.

On January 10, shortly after the parties had agreed to certain modifications to the attachments and restraining orders not at issue here, petitioners moved, by order to show cause, to confirm the orders as modified. Argentina and the Central Bank in turn moved to vacate the attachments and restraints. On January 12, the district court ruled that the attachments and restraining orders should be vacated. App., *infra*, 103a-113a. In explaining that ruling, Judge Griesa first offered these observations about the "big picture" presented by these appeals (*id.* at 103a-104a):

> [T]he Republic, in order to induce investors to buy the bonds, made very broad waivers of sovereign immunity, agreed to jurisdiction in this Court, and presumably that was supposed to mean something. * * * What has been demonstrated by these lawsuits is how little it means. The Republic has done everything possible to avoid the fruition of the lawsuits it agreed to have brought. * * * There's not a whimper of an idea that the Republic might pay the judgments which they really should pay. * * * [T]he Republic is doing everything possible to frustrate [collection].

Next, turning to the motions before him, Judge Griesa expressed "regret" that Argentina's waiver of immunity appeared to be "an illusion." App., *infra*, 105a. Despite acknowledging arguments "on both sides," Judge Griesa held that the Decrees did not "change [the] title to the [U]nrestricted [R]eserves," and that Argentina's repayment of IMF loans was not a "commercial activity" but instead a "governmental financial activity." *Id.* at 107a-109a. Accordingly, the district court held that the FRBNY funds were entitled to the protections of Section 1611 for funds held for a central bank's "own account." The court stayed its order pending appeal because of the "big picture" equities that heavily favored petitioners. App., *infra*, 112a.

D. The Court of Appeals' Decision

The court of appeals agreed with the district court that funds allocated by Argentina for the early repayment of one of its creditors, the IMF, were nevertheless immune from attachment by any other creditor. After acknowledging that Argentina "indisputably waived its assets' immunity from attachment under 28 U.S.C. §§ 1610(a)(1) and (d)(1)," App., *infra*, 30a n.18, the court gave four grounds for affirming the district court.

First, the court held that the attached assets belonged to the Central Bank, not Argentina, notwithstanding the Decrees. Despite conceding that "the Decrees may have manifested the Republic's ability and willingness * * * to direct BCRA to use its assets for the benefit of the Republic," the court concluded that assets subject to those decrees—used for Argentina's benefit and at its direction—were not Argentina's property because they were not under Argentina's "control." App., *infra*, 21a. The court ignored Argentina's own acknowledgment of the change in control of the funds through its issuance of a note to repay the Central Bank.

The court's conclusion that BCRA and not Argentina controlled the attached assets was motivated primarily by considerations about the practical consequences of "conclud[ing] otherwise." App., *infra*, 21a. The court hypothesized that deeming the attached assets to be Argentina's property would "allow creditors of a foreign state to attach all of the assets of the state's central bank any time the foreign state issues directives affecting the central bank's reserves." *Ibid.* But the court ignored the fact that the very FSIA provisions under consideration safeguard all central bank funds similarly appropriated by foreign states, so long as those funds were not directed to be "used for" foreign states' "commercial activity in the United States." 28 U.S.C. § 1610(a), (d).

Second, the court held that "Use of Funds To Repay the IMF Is Not a 'Commercial Activity.'" App., *infra*, 30a. As the court correctly construed 28 U.S.C. § 1610(a) and (d), assets

cannot be attached unless they are used for a commercial activity. The court also correctly concluded that under *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 614 (1992), an activity is commercial in nature if a private party could engage in the same "type of action[]." App., *infra*, 32a. Without explaining why the relevant type of activity was borrowing from the IMF—as opposed to borrowing generally—the court noted several special features of the IMF that make borrowing from it an activity in which private actors cannot engage. The court concluded that, because only foreign sovereigns may borrow from the IMF, such borrowing involves the exercise of sovereign "'power,'" and therefore was not a commercial activity. App., *infra*, 32a (quoting *Weltover*, 504 U.S. at 614). The court did not mention, however, that the FSIA's legislative history categorizes *all* borrowing, including borrowing from "public lending institution[s]" like the IMF, as a type of commercial activity. H.R. REP. 94-1487, at 17, *reprinted in* 1976 USCCAN at 6615-6616.

Third, the court also held that the Decrees' designation of all Unrestricted Reserves as available to repay Argentina's debt to the IMF did not constitute "use[]" of the FRBNY funds. The court first observed that the FRBNY funds were not "actual[ly] use[d]" to repay the IMF—which use, of course, was forbidden at the time by restraining notices and orders of attachment. App., *infra*, 36a. Next, the court concluded that the FRBNY funds were not even "designat[ed] for use" by Argentina, *ibid.*, because, although "the Decrees [had] made *all* BCRA funds *potentially* available" for repaying Argentina's debts, there was no evidence that the FRBNY funds had been "specified" for expenditure. App., *infra*, 37a. The court did not confront the implications of equating "use" with "expenditure"—an approach that would make it impossible to attach funds before they are "used for" loan repayment, and equally impossible to attach them later because the funds will no longer be in the debtor's possession. Moreover, as shown below, petitioners were denied discovery on which BCRA funds had in fact been "specified" for expenditure.

Finally, despite repeatedly citing alleged gaps in the record as reasons to vacate the restraining notices and orders of attachment, the court of appeals held that petitioners were not entitled to limited discovery to fill those gaps. That denial of all discovery concerning Argentina's and BCRA's assertion of sovereign immunity relied on Second Circuit precedent holding that plaintiffs should generally be allowed "limited discovery with respect to the jurisdictional issue" but should not be allowed "*other* discovery" unless the limited discovery reveals "a reasonable basis for assuming jurisdiction" over a foreign state. *First City, Texas-Houston, N.A.* v. *Rafidain Bank ("Rafidain I")*, 150 F.3d 172, 177 (2d Cir. 1998) (quoting *Filus* v. *Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990)) (emphasis added). But the court overlooked that EM actually was seeking *post-judgment* discovery following a lawsuit that in fact established a basis for assuming jurisdiction over Argentina—namely, Argentina's issuance of the bonds underlying the over $700 million judgment in EM's favor against Argentina. Moreover, the court not only refused to authorize the broad, "other" discovery warranted in the post-judgment context, but also refused to authorize even the minimum "limited discovery" that the courts of appeals routinely allow in virtually all cases implicating the FSIA. Instead, while relying on a record petitioners were not permitted to develop, it concluded that petitioners were not entitled to *any* discovery. App., *infra*, 39a-40a.

REASONS FOR GRANTING THE PETITION

This case involves, in the attachment context, the FSIA's "most significant" exception, namely, its "commercial activity" carve-out of sovereign immunity. See *Weltover*, 504 U.S. at 611 (issuance of bonds is a commercial activity). The context, moreover, amplifies that exception's significance. Sovereign debtors, such as Argentina, frequently "take purposeful advantage of their de facto immunity to walk away from legal and financial obligations." Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J.

INT'L L. 311, 316 (2005). An overly narrow application of the FSIA's "commercial activity" exception, therefore, would unduly weaken one of the few bulwarks standing between sovereign debtors and freedom to ignore or flout the judgments of American courts, as Argentina has done in this case.

This Court's attention is necessary to address this problem because the FSIA (implicitly) delegates to the judiciary responsibility for interpreting many of the FSIA's most critical provisions. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359 (1993) (exercise of police power is not a commercial activity). The present case concerns three terms that the FSIA leaves "largely undefined," *Weltover*, 504 U.S. at 612, and an additional issue that the FSIA does not meaningfully address: What is "[1] property of a foreign state * * * [2] used for [3] a commercial activity," 28 U.S.C. § 1610(a), (d), and [4] are post-judgment creditors in FSIA litigation entitled to any discovery?

Although it is perhaps unremarkable that the FSIA's text does not explicitly answer those questions, it is striking that the lower court's answers departed so dramatically from the decisions of so many other courts and from the FSIA's legislative history. In creating or deepening three circuit splits, the Second Circuit reached four misguided conclusions. First, it read into the FSIA a rule that foreign states virtually cannot, even by decree—and even under an obligation to repay the central bank—convert central bank property to their own. Second, it ignored case law defining "commercial activity" and the FSIA's legislative history, which explicitly states that all borrowing is commercial in nature. Third, it held that a foreign state may set aside a large pot of money for the repayment of one creditor without subjecting that pot to attachment by other creditors. And fourth, it held that a post-judgment creditor who has previously established jurisdiction over a sovereign debtor can be denied discovery altogether in an execution action, thereby rejecting the consensus view that virtually all plaintiffs are entitled at the very least to jurisdictional discovery.

The consequence of these holdings will be to permit Argentina to prepay its IMF debt while withholding from petitioners $105 million in other assets designated for loan repayment. Although that amount represents only a fraction of petitioners' judgments against Argentina, it is $105 million more than Argentina is willing to pay toward those judgments. Petitioners have sought since 2003 to find assets to satisfy the judgments that Argentina *invited* when it agreed to jurisdiction and waived sovereign immunity in the underlying debt instruments. During that time, Argentina has sought to render those agreements "totally illusory," to borrow Judge Griesa's phrase (App., *infra*, 104a), by removing attachable assets from the jurisdiction. Given those cynical tactics, Argentina perhaps regrets that the Decrees earmarked all of the Unrestricted Reserves, *including those in the United States*, for repaying international monetary authorities. That, however, is clearly what the Decrees did. By holding that the FSIA should be interpreted to ignore that reality, the decision below rewarded behavior that was not only cynical, but clumsy as well.

The decision's implications will also be severe throughout the Second Circuit—which, as this Court noted in a prior case involving Argentina's default on its debts, includes New York City, a "'world financial leader,'" *Weltover*, 504 U.S. at 618. Now, in the Second Circuit, foreign states that have "explicitly waived [their] immunity from attachment," 28 U.S.C. § 1610(d)(1), will nevertheless have four new means of frustrating disfavored creditors: (1) funneling foreign state property through central banks; (2) preferring public creditors to private ones; (3) designating large, undifferentiated sums of money from which to pay preferred creditors; and (4) stonewalling plaintiffs in discovery. Although Argentina employed *all* of those tactics here, successfully employing *any one of them* will now permit other sovereign debtors—or, quite possibly, Argentina yet again, see App., *infra*, 5a-7a n.2—to shield from attachment assets that do not warrant protection under the FSIA.

Sovereign debtors should not be given those new tools—none of which is mandated by the FSIA—to avoid paying their legitimate debts. Opportunities to collect from sovereign debtors already are exceedingly rare. As one leading scholar (and the author of the leading text on international finance) has explained, both overborrowing and nonpayment "result[] from the fact that sovereigns face few consequences as a result of default." Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina*, Washington Legal Foundation, Working Paper Series No. 140, at 1 (Sept. 2006), available at http://atfa.org/resources/scott_wp.pdf. The Second Circuit's narrowing of the FSIA's commercial activity exception weakens one area in which Congress specifically provided that a foreign sovereign's default on debt obligations *should* have consequences.

That undue expansion of immunity, moreover, will disproportionately advantage foreign sovereigns who regard the FSIA as something to exploit. President Kirchner, for example, sees the FSIA's immunity provisions not as a font of U.S.-Argentine goodwill but instead as an opportunity to "snub the West without cost" and thereby appeal to his constituency's anti-Americanism. Scott, *Sovereign Debt Default*, *supra*, at 38. Thus, because it is so susceptible to abuse, the decision below upsets the proper balance between respecting foreign sovereigns and, as Congress specified, holding them accountable for their commercial activities.

I. By Directing that Unrestricted Reserves Held by the Central Bank Be Used to Repay One Creditor of Argentina, Argentina Changed the Status of Those Reserves so as to Make Them Attachable by Other Creditors of Argentina

The court of appeals' narrow view of what constitutes foreign state "property" would enable foreign states to use assets for commercial activities while simultaneously shielding them from attachment. Specifically, the court ruled that central bank assets diverted by foreign states to their own use are not foreign

state property and, accordingly, are immune from attachment *even if* used for the foreign state's commercial activities.

The court's sweeping conclusion was motivated by a belief that a contrary conclusion might render all assets held by central banks attachable "absent otherwise-applicable sovereign immunity protections." App., *infra*, 21a n.12. That concern overstates petitioners' litigation position and downplays the FSIA's protections. First, petitioners do not contend that *routine* directives to central banks to return assets to a government for *governmental* activities convert ownership of those assets in any relevant fashion. Nor do they contend that a foreign state's *mere authority* to appropriate central bank assets for commercial activities exposes to attachment funds that have not actually been appropriated for those activities. Rather, they contend that a *particular* directive to a central bank to use part of its assets to *repay a nation's external debt* makes *those assets* available to repay other creditors. That is a much narrower theory than the court attributed to petitioners. And, although the directive in this case allocated $8.4 billion in reserves, the "vast[ness]" of that amount (*id.* at 20a n.11) is attributable to the breadth of the Decrees, not to overreaching by petitioners.

Second, the vastness of a particular cache of funds is an exceedingly weak reason to conclude that those funds are not foreign state "property." Every nickel owned by a foreign state and kept in the United States is potentially subject to attachment, "*absent otherwise-applicable sovereign immunity protections*." App., *infra*, 21a n.12 (emphasis added). That fact is no cause for alarm, however, because the immunity protections for foreign state property are so strong. For example, the court expressed a concern that assets in the United States Federal Reserve System "would" be treated as attachable interests of the United States because the United States has authorized transfers of "surplus funds" to the Treasury. *Ibid.* However, there is no hint of commercial activity in that conduct, and thus no reason to suppose that the FSIA would inadequately protect those assets.

There is yet another layer of protection for such assets because of the central bank immunity provided by 28 U.S.C. § 1611(b)(1). Section 1611(b)(1) affords immunity to "the property of a foreign state * * * *if* * * * the property is that of a foreign central bank or monetary authority *held for its own account*" (emphasis added). Whereas Section 1611(b)(1) would strengthen the protections for the assets in the court's hypothetical example, that provision counsels strongly against ignoring foreign state ownership of funds *held* by a central bank but *used* for a foreign state's commercial activities.

The legislative history of Section 1611(b)(1) reveals that the attached assets in this case were not held for BCRA's "own account." That history explains that the FSIA's central bank immunity "applies to * * * funds used or held in connection with central banking activities, *as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states*." H.R. REP. 94-1487, at 31, *reprinted in* 1976 USCCAN at 6630 (emphasis added). The Unrestricted Reserves fit the language the legislative history employs to describe the *opposite* of funds held for a central bank's "own account." Under the Decrees, the Unrestricted Reserves are used to finance repayment of Argentina's debts to multilateral lenders, including its IMF loan. Had the court considered that the FRBNY funds were no longer held for the Central Bank's own account within the meaning of Section 1611, it might not have felt impelled to reach the implausible and unsupported conclusion that the Central Bank had the only relevant ownership interest in funds being used to pay *Argentina*'s debt.

The court did not square its holding with the language and legislative history of Section 1611, and its one attempt to provide legal support for that holding is undermined by the very authorities it cited. The court stated that "[c]orporate law principles * * * apply by analogy to the relationship between the Republic and its instrumentality [the central bank]." App., *infra*, 21a-22a. Applying those principles, the court correctly observed that a corporation's shareholders "cannot transfer or assign the

corporation's properties and rights, nor apply corporate funds to personal debts." *Id.* at 22a (quoting 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 31, at 78, 84 (rev. ed. 2006)). Yet the court failed to recognize that applying "corporate funds"—assets held by the central bank—to a "personal debt[]"—Argentina's debt to the IMF—is *exactly* what the Decrees did. What *necessarily* follows is that Argentina was *not* acting as a mere shareholder when it did that which a mere shareholder cannot do. The Decrees thus *altered* the pre-existing relationship between Argentina and its central bank in exactly the way that matters: they made "corporate" (central bank) funds available to pay "personal" (Argentina's) debt. For precisely that reason, *any* creditor of Argentina—not just the one creditor Argentina wished to pay—should have had a claim on the Unrestricted Reserves.

Moreover, Argentina's issuance of a note documenting its obligation to *repay* the Central Bank for the money it paid to the IMF *confirms* that the Decrees diverted the Unrestricted Reserves from central bank uses to Argentina's use. Had this been a routine instance of "any time the foreign state issues directives affecting the central bank's reserves," App., *infra*, 21a, Argentina would not have needed to take any additional steps with respect to the IMF repayment. By issuing that note, Argentina *acknowledged* that its Decrees directed the Central Bank to use assets not for central bank activities. And the particular activity Argentina had in mind—repaying Argentine commercial debt—is precisely what petitioners claim those funds should be available for now.

The Second Circuit's contrary position threatens broad implications for FSIA litigation. To say that Argentina could direct its central bank to repay a debt—*regardless of whether it was commercial in nature*—without in any way affecting ownership or control of the assets designated for repayment of that debt, is to give recalcitrant sovereign debtors a roadmap to pick and choose which of their valid *commercial* debts they will repay (using assets in the United States), and which they will continue

to ignore. To avoid the legal system, they need only funnel their repayments through their central banks. Courts of the United States need not cede such power to foreign debtors that have validly subjected themselves to the jurisdiction of U.S. courts, especially where, as here, that debtor nation is explicitly flouting the valid judgments of a U.S. court.

II. The Second Circuit's "Commercial Activity" Analysis Cannot be Reconciled with the Decisions of Other Courts of Appeals or with the FSIA's Structure and Legislative History

The Second Circuit adopted a "commercial activity" analysis that is out of step with the decisions of this Court and other courts of appeals. An activity is "commercial [in] character" if it is the *type* of activity in which a private party can engage, as opposed to the exercise of a peculiarly sovereign power. See *Weltover*, 504 U.S. at 614; 28 U.S.C. § 1603(d). The court determined that the type of activity in which Argentina had engaged was borrowing and repaying money *from and to the IMF*, as opposed to borrowing and repaying money in general, and that such activity exercised a sovereign power. The court provided no explanation for defining the "type" of activity and the nature of sovereignty in such a particularized way.

In contrast, other courts of appeals have consistently defined the relevant "type" of activity at a higher level of generality and the universe of "sovereign powers" with more circumspection. Their broad, bird's-eye approach closely adheres to this Court's FSIA decisions and, accordingly, to the restrictive theory of sovereign immunity codified in the FSIA. Indeed, the Second Circuit's holding in this case not only chafes against the decisions of its sister circuits, but is *foreclosed* by the FSIA's legislative history, which regards all borrowing as commercial.

Furthermore, Section 1603(d)'s mandate to consider whether an activity is commercial in "character" applies here only because Congress *elected to omit* from the FSIA a provision of the original bill that would have created immunity

for claims involving "public debt" that was incurred by a foreign state for "general governmental purposes." H.R. 11315, 94th Cong., 1st Sess. (Dec. 19, 1975) (proposed § 1606). The Judiciary Committee dropped the public-debt provision because it "would serve no significant purpose and *would be inappropriate*." H.R. REP. 94-1487, at 10, *reprinted in* 1976 USCCAN at 6609 (emphasis added). By assessing commercial character at the wrong level of generality—*i.e.*, focusing on "borrowing from the IMF" instead of simply "borrowing"—the Second Circuit has effectively created the very immunity Congress deemed "inappropriate," and declined to enact.

A. The Court of Appeals Misunderstood the Type and Nature of the Activity at Issue

If the opinion below is permitted to stand, foreign states litigating in the Second Circuit will be able to characterize as "sovereign" governmental conduct that, in other circuits, is duly recognized as merely incidental to commercial activity. The court below concluded that, because IMF borrowing is exclusive to nations, it is not a commercial activity but instead the exercise of a sovereign power called "borrow[ing] from the IMF." App., *infra*, 33a. Likewise, the court concluded that, because the IMF often attaches conditions to its loans—hardly a remarkable feature of loans to debtors with bad credit—IMF borrowing is "regulatory in nature." *Id.* at 34a.

That approach conflicts with the analytical framework that has evolved in the courts of appeals following *Weltover* and *Saudi Arabia* v. *Nelson*. Those decisions explained that the FSIA aimed to restrict immunity to a foreign state's "sovereign acts," *Weltover*, 504 U.S. at 613, 614; *Nelson*, 507 U.S. at 359, and that, as a result, conduct is commercial in nature unless it "boils down" to the exercise of some sovereign *power*, *Nelson*, 507 U.S. at 361. *Weltover* and *Nelson* did *not* hold that an act is commercial only if a private party could have performed *that act*. Instead, the Court emphasized that an activity is commercial if a private actor could have engaged in conduct of the same "manner" (*Weltover*, 504 U.S. at 614), "*type*" (*ibid.*),

"sort" (*Nelson*, 507 U.S. at 362), or "kind" (*id.* at 360, quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987)).

Although assessing an activity's "type" is perhaps more art than science, the obligation to make that assessment reflects the FSIA's mandate to avoid approaching the term "commercial activity" with tunnel vision. Thus, instead of asking whether a private party could have done *exactly* what the foreign state did, courts must seek to identify "analogous" private conduct. *Weltover*, 504 U.S. at 616. *Weltover*, for example, involved a bondholder's suit based on a presidential decree extending the maturity dates on certain government bonds. But *Weltover* did not recognize a "sovereign power" to issue government bonds or decrees concerning them, even though private parties obviously cannot do those things. Indeed, although "a presidential decree is clearly not commercial activity," *Weltover* held that "the issuance of the bonds was" one. *Adler* v. *Federal Republic of Nigeria*, 107 F.3d 720, 725 (9th Cir. 1997); see also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 698-699 (1976) (plurality opinion) (construing as "commercial" a foreign state's repudiation of its debt).

Taking their cues from this Court, other courts of appeals regard as commercial an activity—even one accomplished through sovereign channels, such as the presidential decree in *Weltover* or the repudiation in *Alfred Dunhill*—if there is some analogous "manner," "type," "sort," or "kind" of private commercial activity. *E.g.*, *Sun* v. *Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000) (commercial activity inquiry must identify "a category of conduct"). In their view, conduct that approximates a private commercial transaction is "commercial" *even if the transaction entails conduct that no private player can duplicate.*[1] On the other hand, conduct is sovereign only if it invokes

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[1] See, *e.g.*, *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1216 (11th Cir. 2005) (contract calling for storage of weapons by the Honduran Armed Forces was commercial); *Globe Nuclear Servs. & Supply, Ltd.* v. *AO*

some broadly defined and widely recognized power inherent in governance. Thus, just as the use of the police power was deemed non-commercial in *Nelson*, so too are the exercise of eminent domain and payment of war reparations.[2]

By approaching the commercial activity exception at a high level of generality, the courts of appeals avoid creating "a cloak of protection over typical commercial activities." *Cicippio* v. *Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994). The court below did just the opposite; it overlooked the "type" of activity involved in IMF lending and instead deemed "sovereign" the aspects of IMF lending that are analogous but not identical to private conduct. For example, although the enforcement of a debt is obviously commercial conduct, the court reasoned that IMF loans are "vehicle[s]" for sovereign conduct because they are enforced by foreign states. App., *infra*, 35a. That reasoning, however, requires the unwarranted assumption that an activity that is commercial in nature when undertaken by

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Techsnabexport, 376 F.3d 282, 289 (4th Cir. 2004) (contract of Russian Federation to supply private company with uranium extracted from nuclear weapons was commercial); *Sun*, 201 F.3d at 1108, 1109 (cultural tours were commercial, even if "no private party would sponsor a non-profit cultural tour to foster ties with individuals of Chinese descent overseas and promote understanding of Chinese culture," because "[n]o private party would refinance government debt either, but the Supreme Court has held this activity to be commercial"); *Janini* v. *Kuwait Univ.*, 43 F.3d 1534, 1537 (D.C. Cir. 1995) ("That the termination [of an employment contract] here may have been accomplished by a formal decree of abrogation does not affect its commercial nature."); *Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375, 1385 (5th Cir. 1992) (contract to sell airplane was commercial, even though it was part of a governmental effort to recover ill-gotten gains of the previous regime); *McDonnell Douglas Corp.* v. *Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir.1985) (contract to supply Iran with military aircraft parts was a commercial activity); see also *Virtual Def. & Dev. Int'l Inc.* v. *Republic of Moldova*, 133 F. Supp. 2d 1, 4 (D.D.C. 1999) (contract for the sale of MiG-29 fighters was a commercial activity).

[2] See, *e.g.*, *Beg* v. *Islamic Republic of Pakistan*, 353 F.3d 1323, 1326 (11th Cir. 2003) (eminent domain); *Wolf* v. *Federal Republic of Germany*, 95 F.3d 536, 543-544 (7th Cir. 1996) (war reparations).

a single nation somehow becomes non-commercial if nations do it collaboratively.

Not only does the Second Circuit's approach threaten an undue expansion of sovereign immunity, but it is also unworkable. Almost all commercial conduct by a foreign state, including the quintessentially commercial act of repaying a loan, will involve some conduct that could be labeled "sovereign." Likewise, a foreign state will "almost always be able to characterize its activities as sovereign 'regulation' of some subject matter related to the conduct at issue." *Globe Nuclear Servs. & Supply, Ltd.* v. *AO Techsnabexport*, 376 F.3d 282, 290 (4th Cir. 2004) (holding that contracting for uranium in a way "no private player can" did not "regulate" the uranium market). "[That] usage of 'regulation' is not only inconsistent with the Supreme Court's decision in *Weltover*, but would also strip the 'commercial activity' exception of much, if not all, of its meaning." *Ibid.* Lax usage of the terms "sovereign" and "regulatory" is precisely what plagues the Second Circuit's decision. Unlike its sister circuits, the court below ignored this Court's instruction to focus on the type of activity in which a foreign state has engaged and, consequently, unduly lowered the bar for showing a sovereign, non-commercial act.

B. The FSIA's Structure and Legislative History Show that Repaying a Loan is a "Commercial Activity"

In addition to discarding the prevailing analytical tools for interpreting the commercial activity exception of Section 1610, the decision below also erred in answering the specific question before it: whether IMF debt escapes the general rule that the issuance and repayment of debt is not "categorically different from other [commercial] activities of foreign states." *Weltover*, 504 U.S. at 615. Although *Weltover* arguably left that question open, see *ibid.*, the FSIA's structure and legislative history provide great clarity.

For example, Section 1611(a) of the FSIA created an explicit exception to the attachment rules specified in Sec-

tion 1610 for funds being *disbursed to* or at the direction of a foreign state from an organization designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act. *The IMF is such a designated organization.* Executive Order 9751, 11 Fed. Reg. 7713 (July 11, 1946). If sovereign borrowing activities from organizations such as the IMF did not fall within the attachment rules of Section 1610 because they were "governmental" rather than "commercial" activities, there would have been no need for such a provision. Moreover, Congress specifically decided to protect property of the IMF, or similar organizations, used for making loans to foreign states but *not* property of a foreign state earmarked for repaying such a loan. The Second Circuit's decision has effectively rewritten that statute.

Similarly, the House Report states: "Activities such as a foreign government's * * * borrowing of money * * * would be among those included within the definition" of commercial activity. H.R. REP. 94-1487, at 16, *reprinted in* 1976 USCCAN 6604, 6615. The report places no limitations on *which* borrowing will be deemed "commercial," but says that *all* borrowing is of the relevant "type." The House Report also explains:

> This definition [of commercial activity] includes * * * an indebtedness incurred by a foreign state * * * which receives financing from a private *or public* lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States.

Id. at 17, *reprinted in* 1976 USCCAN at 6615-6616 (emphasis added).

Thus, although the court of appeals gave no explanation for holding that the relevant type of activity was borrowing *from the IMF*, there is authoritative guidance *contrary* to the court's choice. "Borrowing," not borrowing from a particular lender, is

the relevant type of activity, and the House Report specifically forecloses a distinction between private and public lenders.

The House Report also dislodges another pillar of the Second Circuit's holding. The court believed IMF loans could be distinguished from the government bonds in *Weltover* because IMF loans take the form of currency exchanges instead of "debt instruments." App., *infra*, 35a. Aside from ignoring the fact that currency exchanges are themselves commercial activity in which any private commercial actor could engage, the court's assertion overlooked the House Report's broad statement that all "*financing* from a * * * public lending institution"—and not simply the issuance of typical debt instruments—is commercial in nature. H.R. REP. 94-1487, at 17, *reprinted in* 1976 USCCAN at 6615-6616 (emphasis added). The House Report was careful to mention "loans, guarantees or insurance" as illustrative "example[s]" drawn from the larger universe of "indebtedness incurred by a foreign state." *Ibid.* Whatever form IMF loans might take, they indisputably denote "indebtedness."

III. The Second Circuit's Definition of "Use" Creates a Circuit Conflict and Would Make it Impossible to Attach Loan-Repayment Assets Until it is Too Late

The lower court's holding that assets designated for loan repayment are not "used for" loan repayment helps to demonstrate the exceptional importance of this case. Defaults by debtor nations in general, and Argentina in particular, are a significant worldwide problem. Creditors that Argentina (or any other debtor nation) should be repaying have relatively limited opportunities to find assets being used by the debtor nation for a commercial activity in the United States. When the commercial activity in question is repayment of debt—the very thing Argentina is *refusing* to do here, and characteristically the very reason why creditors resort to attachment—it is important that legal rules sensibly identify property that is being *used for* but not (or not yet) *spent on* that activity. Otherwise, if the only way to attach assets is to show that those exact assets *have been transferred* to another creditor, it is impossible for the non-

preferred creditor to attach the assets. The preferred creditor gets to keep them, and the effect is to give the debtor unilateral authority to decide *which* among its valid creditors it will repay with its assets in the United States.

It is not surprising, therefore, that the Second Circuit stands alone in its approach to assessing whether assets that are not expended for a commercial activity may nevertheless be "used for" that activity. Whereas the court below asked whether the FRBNY funds were at some point singled out from among the Unrestricted Reserves for repaying the IMF, the Fifth Circuit views the relevant inquiry as whether the attached assets "were * * * cordoned off for use of the [foreign state] in its sovereign capacity." *Af-Cap, Inc.* v. *Republic of Congo*, 383 F.3d 361, 370 (5th Cir.), on rehearing, 389 F.3d 503 (5th Cir. 2004), cert. denied, 544 U.S. 962 (2005).

There is no possible argument that the FRBNY funds were cordoned off for sovereign use. Quite the contrary, they were part of the Unrestricted Reserves that the December 15 decrees specifically allocated *from* central banking uses—or any other use—*to* the non-sovereign use of repaying *Argentina*'s debt to the IMF. To be sure, the IMF debt was not in fact repaid with FRBNY funds—it could not have been, because they were attached—and Argentina claims (in a proposition plaintiffs have no way of testing without discovery, which the courts below denied, see App., *infra*, 39a-40a) that the FRBNY funds were never earmarked for that purpose. But the Decrees do not reflect that claim; they freed all of the Unrestricted Reserves—and not just the particular pesos, dollars, or Euros ultimately expended to repay the IMF—for *Argentina*'s repayment of its IMF debt.

The Second Circuit acknowledged that the Decrees made "*all* BCRA funds" eligible for loan repayment, yet still believed that more "specific designation * * * would be necessary" to constitute "use" of those funds. App., *infra*, 37a. That analysis—under which only particular dollars, rather than the larger sum from which those dollars are drawn, can ever be "used" for loan repayment—is inconsistent with Fifth Circuit case law. In

Af-Cap, because the Congo had *previously* "diverted" to a commercial activity *portions* of its revenue from certain tax and royalty obligations, the Fifth Circuit concluded that *the entire present revenue stream* from those obligations "[is] used for" a commercial activity and thus subject to attachment. 383 F.3d at 370. Here, not only were portions of the Unrestricted Reserves actually diverted, as in *Af-Cap*, but that diversion was not mere happenstance, but instead the result of emergency presidential decrees specifically designating all of the Unrestricted Reserves for that use. It was thus Argentina's calculated decision to put *all* of the money it designated "in service of [a] commercial activity." *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 258 (5th Cir. 2002).

The Fifth Circuit's conclusion that an entire sum of money is "used" when a portion of that sum is expended is consistent with common sense. See *Conn. Bank of Commerce*, 309 F.3d at 254 ("[A person] *earns* his salary from his job, but he *uses* it to pay the rent, buy groceries, and so forth."). More important, *it avoids extending immunity to assets that do not warrant FSIA protection*: "[T]he availability of this property for whatever purpose—commercial or otherwise—[a sovereign] deems appropriate [makes s]uch property seem[] hardly the type of foreign property the FSIA was designed as a shield to protect, i.e., funds so central to a nation's operations as a sovereign that uses thereof would 'interrupt[] the public acts of [this] foreign state.'" *Af-Cap*, 383 F.3d at 370-71. The Unrestricted Reserves perfectly fit the description of property not deserving of FSIA protection. As Professor Scott described the FRBNY funds:

> The attachment was not aimed at central bank reserves generally, just funds that were to be *used for* debt repayment. These funds were not being used to invest in U.S. Treasury bills or to support the Argentine currency. They were in the process of being withdrawn—the question was who should have them, the IMF or private creditors.

Scott, *Sovereign Debt Default*, *supra*, at 30 (emphasis added).

Although the Second Circuit acknowledged what it termed Argentina's "diplomacy of default,"App., *infra*, 5a n.2, it rewarded Argentina's imprudent drafting of the Decrees. In the court's view, the magnitude of the Unrestricted Reserves cut against deeming them to be attachable. *Id.* at 20a n.11. Argentina could have "cordoned off," *Af-Cap*, 383 F.3d at 370, any assets it wanted for sovereign uses while also designating different assets for the commercial activity of repaying the IMF. It did not. Thus, the broad implications that worried the court of appeals cannot be traced to a novel legal theory advanced by petitioners. Rather, they lie at Argentina's doorstep; Argentina *chose* to expose the FRBNY funds after removing other attachable assets from the jurisdiction, and Argentina's defaults have created numerous valid creditors. See *id.* at 369 n.8 ("[I]t would be appropriate for a court to consider whether the use of the property in question was being manipulated by a sovereign nation to avoid being subject to garnishment under the FSIA."). Argentina's designation of billions of dollars for a commercial activity, and failure to exclude from its designation assets in the United States, constituted "use" under the FSIA of all the Unrestricted Reserves, including the FRBNY funds.

In concluding otherwise, the Second Circuit created a circuit conflict and rewarded Argentina for behavior that should have been penalized. To save Argentina from itself, the court turned bad Argentine diplomacy into bad American law.

IV. The Second Circuit's Refusal to Permit Discovery by Petitioners, while Holding Against Petitioners the Undeveloped Factual Record Below, Creates a Circuit Split and Violates Due Process

The Second Circuit's holding that petitioners were entitled to *no discovery at all*, and that the absence of evidence EM had sought in discovery cut in *Argentina*'s favor, conflicts with the decisions of numerous courts of appeals. Those decisions establish that plaintiffs in FSIA litigation are normally entitled to the sort of targeted discovery that petitioners were denied here, see App., *infra*, 10a n.5, and that post-judgment creditors

are in fact entitled to a full complement of discovery. Those holdings follow from the FSIA's purpose, this Court's decisions concerning discovery, and the due process rights of plaintiffs.

The FSIA's legislative history emphasizes that a foreign state's *potential* immunity from suit does not justify proceeding as though the foreign state were immune. Rather, "[t]he ultimate burden of proving immunity * * * rest[s] with the foreign state." H.R. REP. 94-1487, at 17, *reprinted in* 1976 USCCAN at 6616. A judgment entered against a foreign state, therefore, signifies that state's failure to carry its burden. Moreover, although the FSIA's attachment provisions create some measure of protection for sovereign assets, they do not "vest in [a foreign sovereign] a 'right' not to pay a valid judgment" by reopening the jurisdictional battle it has already lost. *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992). Thus, once a court determines that "subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction *continues* long enough to allow proceedings in aid of [a] money judgment." *First City, Texas-Houston, N.A.* v. *Rafidain Bank ("Rafidain II")*, 281 F.3d 48, 54 (2d Cir. 2002) (emphasis added).

Allowing "full" post-judgment discovery against a sovereign debtor, therefore, "[does] not intrude upon * * * sovereign immunity." *Rafidain I*, 150 F.3d at 177; see also *Richmark Corp.*, 959 F.2d at 1478. The court below, however, denied not only full discovery but *all discovery*, based on case law holding that "'discovery should be ordered circumspectly'" when a foreign state's immunity *has not previously been adjudicated.* App., *infra*, 39a (quoting *Rafidain I*, 150 F.3d at 176).

Even if the court below had been justified in proceeding as if petitioners were seeking *jurisdictional* discovery, as opposed to discovery concerning the assets of a non-immune debtor, its complete curtailment of that discovery would not have been warranted. To be sure, other courts of appeals have instructed district courts to "limit[] [jurisdictional discovery] to the essentials necessary to determining the preliminary question of jurisdiction." *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853

F.2d 445, 451 (6th Cir. 1988), cert. dismissed, 503 U.S. 978 (1992). That instruction, which concerns how district courts should exercise their discretion to control jurisdictional discovery, does not authorize district courts to eliminate discovery entirely when facts critical to an immunity determination are at issue. *Limited* discovery is manifestly not the same as *no* discovery, and no court of appeals other than the court below has held otherwise.

Indeed, "where issues arise as to jurisdiction or venue, discovery *is available* to ascertain the facts bearing on such issues." *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 351 n.13 (1978) (emphasis added). Thus, the D.C., Third, Fifth, Sixth, Seventh, and Ninth Circuits have concluded that a plaintiff against whom a defendant invokes sovereign immunity "must [be] give[n] * * * '*ample opportunity* to secure and present evidence relevant to the existence of jurisdiction.'" *Phoenix Consulting Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (quoting *Prakash* v. *Am. Univ.*, 727 F.2d 1174, 1179-1180 (D.C. Cir.1984)) (emphasis added).[3] The discovery

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[3] See *Fed. Ins. Co.* v. *Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 n.11 (3d Cir. 1993) ("We agree with other courts of appeals that * * * the parties should be granted a fair opportunity to engage in jurisdictional discovery" concerning sovereign immunity.); *Conn. Bank of Commerce*, 309 F.3d at 260 n.10 ("[T]he district court may on remand limit any additional discovery to facts relating to the immunity determination."); *Trans Chem. Ltd.* v. *China Nat'l Mach. Import & Export Corp.*, 161 F.3d 314, 319 (5th Cir. 1998) (adopting portion of district court opinion holding that plaintiff was entitled to jurisdictional discovery concerning sovereign immunity); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d at 451 ("the parties * * * must be afforded a fair opportunity * * * to submit evidence necessary to the resolution of the issues" through "discovery and fact-finding * * * limited to the essentials necessary to determining the preliminary question of jurisdiction"); *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 892 n.2 (7th Cir. 1991) ("[P]laintiffs are entitled to conduct discovery for the limited purpose of establishing jurisdictional facts under the [FSIA] prior to any dismissal."); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992) ("[T]he parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed.").

afforded to post-judgment creditors should be at least as broad as the ample jurisdictional discovery afforded all plaintiffs in FSIA litigation. See *Rafidain II*, 281 F.3d at 54; cf. *Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007) (declining to decide whether "immunity from discovery is more limited in an execution action than in a liability action," in light of district court's conclusion that the "more than fifteen months of discovery" by a post-judgment creditor had finally "'gone too far'").

The court below asserted that its unprecedented holding was justified because the record "ma[de] clear that the FRBNY Funds were never an attachable asset of the Republic and that § 1610's 'commercial activity' exception to immunity from attachment does not apply." App., *infra*, 39a-40a. Once again, that line of reasoning finds no support in the case law. Discovery can be denied if a plaintiff's allegations are vague or frivolous, which petitioners' claims are not.[4] Discovery cannot be denied, however, based on a court's judgment that assessing an undeveloped factual record is preferable to imposing modest production burdens on a non-immune defendant concerning *assets* that might be immune from attachment.

Moreover, the Second Circuit's own characterization of the record in this case undercuts its assertion that discovery would not have mattered. The Second Circuit repeatedly based its holdings in favor of Argentina on the lack of evidence in the

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[4] Cf. *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 536, 537 (5th Cir. 1992), *cited in* App., *infra*, 39a, 40a (plaintiff was not entitled to "massive discovery" based on "generalized" and "self-contradictory" conspiracy allegations); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 783 (S.D.N.Y. 2005) (ordering discovery against some sovereign defendants and not others in case in which plaintiffs indiscriminately tried to blame many sovereign entities for terrorist attacks on World Trade Center and Pentagon); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 553 (S.D.N.Y. 2005) (with respect to another sovereign entity, "Plaintiffs have not identified a factual dispute that would require jurisdictional discovery").

record supporting petitioners. In assessing who controlled the FRBNY funds, for example, the court asserted that: petitioners had not "point[ed] to any order or other document" aside from the Decrees that reflect a transfer of ownership from the BCRA to Argentina (App., *infra*, 18a); the record was "barren of any evidence" concerning such a transfer (*id.* at 21a); and petitioners "ha[d] not demonstrated" that Argentina held an attachable interest in the FRBNY funds (*id.* at 22a n.13). Likewise, the court's "commercial activity" analysis relied on a conclusion that "the record is barren of any evidence that the FRBNY Funds were to be 'used for' repayment of the IMF" (*id.* at 4a)—because, "on the present record," the court believed that there was "no evidence" of actual use or designation for use of the FRBNY funds (*id.* at 32a, 36a). Based on the missing evidence, the very subjects of EM's discovery request, the court reached the exceedingly guarded conclusion that "the Decrees alone" did not render the FRBNY funds attachable by Argentina's creditors. *Id.* at 37a.

Thus, although the court below stated that additional evidence would have made no difference for petitioners, it repeatedly held against petitioners the absence of such evidence. Accordingly, the opinion itself demonstrates that the five targeted areas of discovery sought by petitioners—concerning the effect of the Decrees and the use of the Unrestricted Reserves (see App., *infra*, 10a n.5)—could have produced relevant evidence concerning the ownership of the Unrestricted Reserves (including the FRBNY funds), how those funds were used or intended to be used, and the nature of that use (for IMF repayment or other commercial activities).

The Second Circuit's reliance on a "barren" record while simultaneously denying petitioners any means to make the record less barren implicates core due process concerns. "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Société Internationale pour Participations Indus-*

trielles et Commerciales, S.A. v. *Rogers*, 357 U.S. 197, 209 (1958). Thus, litigants have a due process interest in obtaining evidence supporting their claims, which includes the right not to have claims dismissed due to unwarranted or punitive discovery sanctions. See *Hammond Packing Co.* v. *State of Arkansas*, 212 U.S. 322, 351 (1909) (default judgment did not violate due process because the defendant's "refusal to produce evidence" permitted a "presumption * * * of the want of merit in the asserted defense"); *Hovey* v. *Elliott*, 167 U.S. 409, 419 (1897) (due process was violated by contempt sanction that denied right to be heard); see also Fed. R. Civ. P. 37 adv. comm. note (discovery sanctions under Rule 37 must be in "accord" with *Hammond* and *Hovey*).

The Second Circuit's holding that EM was not permitted to discover evidence in Argentina's possession and that the resulting absence of evidence should be construed *against petitioners* mimics the legal fictions erected as discovery sanctions against recalcitrant litigants. "[G]reat caution should be used," however, "not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee*, 243 U.S. 90, 91 (1917) (Holmes, J.). Here, petitioners' attachment orders were dissolved not on the basis of "willfulness, bad faith, or any fault of [petitioners]," but instead based on petitioners' "inability" to collect evidence whose absence the court treated as crucial. *Société Internationale*, 357 U.S. at 212 (a party's inability to comply with a production order is an improper basis for dismissal under Rule 37). That inability, in turn, stemmed from the court's view that petitioners were not entitled to any discovery—a view shared by no other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: August 29, 2006 Decided: January 5, 2007)

Docket Nos. 06-0403-cv, 06-0405-cv, 06-0406-cv

EM LTD.,

Plaintiff-Appellant,

v.

REPUBLIC OF ARGENTINA,

Defendant-Appellee.

NML CAPITAL, LTD.,

Plaintiff-Appellant,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellee.

NML CAPITAL, LTD.,

Plaintiff-Appellant,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellee,

BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Interested-Non-Party-Appellee.

Before: WINTER, CABRANES, and POOLER, Circuit Judges.

Plaintiffs appeal from an order of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) vacating restraining notices and orders of attachment imposed with respect to an account of the Banco Central de la República Argentina at the Federal Reserve Bank of New York on the ground that those assets were protected from attachment by the Foreign Sovereign Immunities Act of 1976.

Affirmed.

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JOSÉ A. CABRANES, *Circuit Judge*:

This appeal arises from the efforts of plaintiffs-appellants NML Capital, Ltd. ("NML") and EM Ltd. ("EM") (collectively, "plaintiffs") to attach certain funds held in an account of the Banco Central de la República Argentina ("BCRA"), the central banking authority of the Republic of Argentina ("Argentina" or "the Republic"), at the Federal Reserve Bank of New York ("FRBNY") (the "FRBNY Account").[1] EM holds, and NML seeks, a judgment against the Republic arising out of the Republic's default on debt obligations held by EM and NML. Even though plaintiffs do not hold or seek judgments against BCRA, they contend that they are entitled to attach $105 million of BCRA's funds held in the FRBNY Account (the "FRBNY Funds"). In particular, plaintiffs argue that the Republic obtained an attachable interest in the FRBNY Funds after the President of the Republic issued two decrees that gave the Republic the authority to use BCRA funds for repayment of the Republic's debts to the International Monetary Fund ("IMF"),

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[1] Plaintiffs also sought to attach accounts held by BCRA in other New York banks, but the FRBNY Account was the only one in which there were any substantial assets. Our conclusions in this opinion concerning the FRBNY Account also apply to all other accounts that were attached by plaintiffs.

but that did not specifically designate the FRBNY Funds for use in repaying the IMF. The United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) vacated orders of prejudgment attachment obtained by NML, and postjudgment restraining notices obtained by EM, that had previously been ordered with respect to the FRBNY Funds. This appeal followed.

We consider here whether the Republic's actions associated with the repayment of its debt to the IMF deprived the FRBNY Funds of immunity from attachment under provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA") related to the attachment of sovereign assets, 28 U.S.C. §§ 1609-11. We affirm the order of the District Court, concluding that the FRBNY Funds are immune from attachment under the FSIA because, notwithstanding the issuance of the decrees, the FRBNY Funds continue to be owned by BCRA, a separate juridical entity from the Republic, and are not available to satisfy a judgment against the Republic. Moreover, we conclude that the provisions of the FSIA allowing attachment of a foreign state's "property in the United States . . . used for a commercial activity in the United States," 28 U.S.C. § 1610(a); *see also id.* § 1610(d) (allowing prejudgment attachment of a foreign state's property "used for a commercial activity in the United States"), would not permit attachment of the FRBNY Funds even if the funds were considered an attachable asset of the Republic. A government's repayment of its debt to the IMF is not a "commercial activity," and the record is barren of any evidence that the FRBNY Funds were to be "used for" repayment of the IMF.

BACKGROUND

I. Facts and Procedural History

In December 2001, in the midst of a financial crisis in Argentina, the Republic announced a moratorium on its debt service payments. Since that time, the Republic has not made

scheduled payments on the debt instruments at issue in this litigation.[2]

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[2] We note that Argentina has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what we might term a diplomacy of default.

Argentina's history of defaulting on, or requiring restructuring of, its sovereign obligations has produced a rich literature. After selling bonds on the London stock exchange in the early part of the 1820s, Argentina defaulted on its debt in 1827 (at roughly the same time that other Latin American nations defaulted on their foreign debt), and did not reach a settlement with creditors on the debt until 1857. See Carlos Marichal, *A Century of Debt Crises in Latin America* 14, 34-35, 55-60, 59 t.2 (1989). Argentina again defaulted on its debts in 1890, causing a financial panic in England as Argentina's primary creditor, the London merchant bank Baring Brothers, experienced a liquidity crisis upon Argentina's default. *See id.* at 149-59. In 1956, Argentina's threatened default led to the creation of the Club of Paris, an international organization established "for the purpose of settling controversies concerning debts that were guaranteed or owed by LDC [Less Developed Country] governments to creditor governments." Mashaalah Rahnama-Moghadam, David A. Dilts, & Hedayeh Samavati, *The Clubs of London & Paris*, Disp. Resol. J., Nov. 1998, at 71, 72; *see also* Paris Club, *Description of the Paris Club*, http://www.clubdeparis.org/en /presentation/presentation.php?BATCH=B01WP01 (last visited Nov. 29, 2006) (describing first meeting of Paris Club in 1956 among Argentina and creditor nations). In 1982, Argentina, along with other Latin American nations, experienced a financial crisis that led it to suspend interest payments on foreign debt and to engage in difficult negotiations with foreign and multilateral lenders. *See* Ernest J. Oliveri, *Latin American Debt and the Politics of International Finance* 163-203 (1992); *see also Republic of Argentina v. Weltover*, 504 U.S. 607, 609-10 (1992) (discussing Argentina's failure to meet foreign exchange insurance obligations in 1982 and foreign debt obligations in 1986). According to one commentator, as the Argentinian debt crisis developed between 1983 and 1985, "Argentina emerged as the single most resistant debtor in international finance." Oliveri, *ante*, at 164. Then, in December 2001, Argentina announced that it would impose a moratorium on public sector debt payments—causing the largest default of a foreign state in history. *See, e.g.*, Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311, 317 (2005) (describing Argentina's most recent default as "by far the largest and potentially most complex default the world has ever

known"); *see also Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168. 175 (2d Cir. 2004) (discussing events leading up to 2001 "debt moratorium").

In light of this history, it is perhaps unsurprising that Argentina's scholars and diplom ats have contributed to development of innovative theories of international law in response to the world community's efforts to collect on defaulted sovereign obligations. The nineteenth century Argentine jurist Carlos Calvo propounded a theory (later called the "Calvo Doctrine") that "absolutely condemn[ed] diplomatic as well as armed intervention as legitimate methods of enforcing any or all private claims of a purely pecuniary nature, at least such as are based upon contract or are the result of civil war, insurrection, or mob violence." Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 Am. J. Int'l L. 26, 26-27 (1907); *see also Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 888 n.19 (2d Cir. 1981) ("[T]he Calvo doctrine, based on the writings of the nineteenth century Argentine jurist Carlos Calvo, holds that a state need compensate aliens only to the extent that it would compensate its own nationals. If under a state's laws its nationals are entitled to no compensation for expropriated property, an alien likewise would have no right to compensation." (citing G. Hackworth, *Digest of Int'l Law* § 530 (1943))). The Calvo Doctrine stands in contrast to principles of customary international law establishing an international standard for claim s of injury to aliens derived from Emmeric de Vattel's assertion that an injury to an alien living in a foreign State constitutes an injury to the alien's state of nationality. *See* E. de Vattel, *The Law of Nations or the Principles of Natural Law* 136 (C. Fenwick trans., Legal Classics Library special ed. 1993) (1758) ("Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen."). From Vattel's famous doctrine flows the "international minimum standard," which, in contrast to the Calvo Doctrine, "takes into account the possibility that the standards prevailing in a given State may be so low that, even if nationals and aliens are treated (or oppressed) alike, the norms of international law [concerning the protection of aliens] will have been violated." Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* 17 (1984); *see also* Frank Griffith Dawson & Ivan L. Head, *International Law N ational Tribunals and the Rights of Aliens* 10 (1971) (describing the "International Minimum Standard of Justice" as "the standard of substantive and procedural treatment which aliens purportedly should receive in 'civilized' States and which they thus should receive abroad under international law"). Under this principle, aliens may be entitled under customary international law to compensation for expropriation of property rights (*e.g.*, through the state's default on its debt obligations) even where nationals of the expropriating state are not. *See* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55

On April 10, 2003, EM, a holder of defaulted Argentine debt, filed an action against the Republic in the United States District Court for the Southern District of New York to recover more than $700 million in interest and principal owed on an Argentine bond it had acquired. EM moved for summary judgment, and the Court granted the motion on September 12, 2003, awarding final judgment to EM in the amount of $724,801,662.56. *See EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG), 2003 WL 22120745 (S.D.N.Y. Sept. 12, 2003), *amended by EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG), 2003 WL 22454934 (S.D.N.Y. Oct. 27, 2003).[3] We affirmed the judgment in favor of EM on August 31, 2004. *See EM Ltd. v. Republic of Argentina*, 382 F.3d 291, 292-94 (2d Cir. 2004).

NML, another holder of defaulted Argentine debt, filed suit in the United States District Court for the Southern District of New York on November 7, 2003, seeking to recover funds due on approximately $170 million in defaulted bonds that the Republic had issued. NML filed a second action on February 28, 2005, seeking payment on approximately $32 million in so-called "Argentine Floating Rate Accrual Notes." No judgment

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Am. J. Int'l L. 545, 557 (1961) ("[T]he provision of com pensation to aliens whose property is taken is consistent with that special protection which is given to aliens, even in cases where such protection may place aliens in a privileged position vis-à-vis the nationals of the State concerned.").

In 1902, Argentina's Minister of Foreign Affairs, Luis M. Drago, developed a narrower proposition (later called the "Drago Doctrine") that "the public debt [of an American state] can not occasion armed intervention, nor even the actual occupation of the territory of Am erican nations by a European power." Hershey, *ante*, at 30 (quoting Letter from Luis M. Drago, Argentine Minister of Foreign Affairs, to Sr. Merou, Argentine Minister at Washington (Dec. 29, 1902)); *see also, e.g.*, Dawson & Head, *ante*, at 12-13 (discussing subsequent history of Drago Doctrine).

[3] As of December 30, 2005, almost $21 million in postjudgment interest had accrued, bringing the total value of the judgment as of that date to $745,544,496.12.

had been rendered in either of NML's suits at the time NML sought to attach the FRBNY Funds.

In the terms and conditions governing EM's bond, the Republic "irrevocably agreed not to claim and has irrevocably waived . . . immunity to the fullest extent permitted by the laws of [the] jurisdiction." Terms and Conditions Governing Bond Issued June 22, 2001, Joint Appendix ("J.A.") 54. The Republic also "consent[ed] generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment, provided that attachment prior to judgment or attachment in aid of execution shall not be ordered by the Republic's courts with respect to . . . the assets which constitute freely available reserves." *Id.* The bonds that NML acquired contained similar waivers.

On December 15, 2005, Argentina's President, Néstor Kirchner, issued two emergency executive decrees: Decree 1599/2005 and Decree 1601/2005 (the "Decrees"). Decree 1599 provided that BCRA reserves in excess of the amount needed for the backing of the Republic's "monetary base," *see* Law No. 23,928 of 3/27/91 art. 6, *as amended by* Law No. 25,561 of 1/7/02 art. 4, J.A. 447 (defining "monetary base" as "composed of the monetary circulation [of Argentine pesos] plus the demand deposits of the financial entities with [BCRA], in checking accounts or special accounts"), "may be used for payment of obligations undertaken with international monetary authorities." Decree 1599/2005 art. 1, J.A. 22. These excess reserves were dubbed "unrestricted reserves" by the decree ("Unrestricted Reserves").[4] Decree 1601/2005 directed the Ministry of Economy and Production (the "Ministry") to take

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[4] "Unrestricted Reserves" under the Decrees are to be distinguished from the "freely available reserves" referenced in the terms and conditions of the bonds. While the term "freely available reserves" referred to reserves held in support of the monetary base, the term "Unrestricted Reserves" as used in the Decrees refers to reserves *not necessary* for support of the monetary base.

the necessary steps to repay the Republic's debt to the IMF out of the Unrestricted Reserves. At the time of the Decrees, BCRA had approximately $26.8 billion in reserves and needed $18.4 billion to cover the monetary base; thus, approximately $8.4 billion in reserves became Unrestricted Reserves pursuant to the Decrees. On December 29, 2005, the Ministry issued Resolution No. 49, directing BCRA to repay the Republic's debt to the IMF and providing that, in exchange, the Republic would give BCRA a non-transferrable note. *See* Resolution No. 49 art. 1, J.A. 511 ("Let [BCRA] be instructed in line with [the Decrees] . . . to repay the debt incurred with the [IMF].").

On December 30, 2005, EM moved in the District Court for an *ex parte* order in aid of enforcing its judgment, and Judge Barbara S. Jones, sitting in Part I, *see* Rules for the Division of Business Among District Judges of the Southern District of New York 5(b) (motions for "emergency matters in civil cases" presented to the district judge sitting in "Part I"), entered restraining notices, *see* 28 U.S.C. § 1610(c) (requiring that a court order the attachment of, or execution against, the assets of a foreign state or its instrumentalities); *see also* Fed. R. Civ. P. 69(a) ("The procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held . . . except that any statute of the United States governs to the extent it is applicable"); N.Y. C.P.L.R. § 5222 (establishing procedure for service of restraining notices on parties holding property of judgment debtor), with respect to property of the Republic and the BCRA held at eight garnishee banking institutions, including the FRBNY. NML contemporaneously sought and obtained from Judge Jones *ex parte* orders of prejudgment attachment and temporary restraining orders concerning the same assets, *see* Fed. R. Civ. P. 64 (providing that remedies involving "seizure of . . . property for the purpose of securing satisfaction of [a] judgment . . . are available under the circumstances and in the manner provided by the law of the state in which the district court is held"); N.Y. C.P.L.R. § 6201 (setting forth grounds for prejudgment attachment under New York law).

On January 3, 2006, the Republic's debt to the IMF was repaid by BCRA using BCRA's assets. The FRBNY Funds were not used in connection with that payment, although the parties dispute whether the funds might have been used for this purpose in the absence of the court-ordered restraints on the transfer of the funds.

On January 6, 2006, the Republic and BCRA moved by order to show cause to vacate the attachments and restraining notices (collectively, the "Restraining Notices"). Following a conference held that day before Judge Griesa, to whom EM's and NML's suits against the Republic had been assigned, the parties agreed to modify the Restraining Notices pending resolution of the order to show cause, and on January 9, 2006, the District Court entered a stipulation and consent order that amended the Restraining Notices so that BCRA could conduct its day-to-day operations. Pursuant to these amended attachments and restraining notices (collectively, the "Amended Restraining Notices"), the garnishee institutions were required to maintain in any covered account a sum not less than 95% of the amount on deposit at the close of business on January 6, 2006. Of the putative garnishee institutions, only the FRBNY held any significant amount—namely, $105 million—that was subject to the Amended Restraining Notices. EM and NML cross-moved on January 10, 2006 to confirm the Amended Restraining Notices, and, in the alternative, EM sought discovery on five issues relating to the validity of the Amended Restraining Notices.[5]

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[5] EM claim s to have sought discovery on the following issues:

(1) the effect of the Decrees under Argentine law; (2) the purposes of the funds subject to the Amended Restraining Notices; (3) how and from where Argentina paid the International Monetary Fund ("IMF") on January 3, 2006; (4) how the Central Bank's actions in implementing the Decrees compare to the "traditional" central banking activities of central banks; and (5) what Argentina plans to do with the foreign exchange reserves subject to the Decrees that will accumulate in the future.

II. The District Court's Decision

Following submissions by the parties and oral argument, the District Court vacated the Amended Restraining Notices by oral decision on January 12, 2006. The District Court described four separate grounds for its decision. First, operating under the premise that assets owned by BCRA could not be used to satisfy judgments against the Republic, it rejected plaintiffs' argument that the Decrees had the effect of transferring ownership of the Unrestricted Reserves in general, or the FRBNY Funds in particular, from BCRA to the Republic. Plaintiffs had conceded at oral argument on the parties' cross-motions that the Unrestricted Reserves were the property of BCRA, not the Republic, before the issuance of the Decrees. The District Court concluded that the Decrees had no effect on the ownership of the Unrestricted Reserves, and certainly no effect on the ownership of the FRBNY Funds; thus, the Unrestricted Reserves and the FRBNY Funds remained the property of BCRA. The District Court agreed that the Decrees reflected the Republic's power to direct BCRA to take certain actions with respect to BCRA's assets, but, according to the District Court, the Republic's ability to exercise some control over BCRA did not mean that the ownership of the FRBNY Funds changed hands from BCRA to the Republic.

Second, the District Court held that even if it were to treat the FRBNY Funds as if they were owned by the Republic, plaintiffs would not be entitled to attach it under the FSIA

Br. of Appellant EM 7. EM has not, however, cited to any part of the record demonstrating that these specific requests were made to the District Court. When disputing EM 's contention that it was improperly denied discovery, the Republic refers to discovery requests made in EM's Memorandum in Support of Plaintiffs' Motion to Confirm, which was apparently filed with the District Court, but which was not included among the materials in the Joint Appendix submitted to this Court. Accordingly, no documents presented to this Court indicate that the requests listed above were made to the District Court. Nevertheless, we assume *arguendo* that, as represented by EM, these requests were made.

unless they were able to demonstrate that the funds had become property of the Republic "used for a commercial activity in the United States," 28 U.S.C. § 1610(a)(1) (permitting postjudgment attachment of a foreign state's property "used for a commercial activity in the United States" if the foreign state had waived immunity from attachment); *id.* § 1610(d)(1) (same as to prejudgment attachment).[6] The District Court concluded

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[6] 28 U.S.C. § 1610 provides, in pertinent part, as follows:

(a) The property in the United States of a foreign state . . . , used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State . . . if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver . . . .

. . . .

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver . . . .

. . . .

(d) The property of a foreign state . . . , used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

that plaintiffs did not satisfy this requirement here because the Republic's payments to the IMF, which were facilitated by the Decrees, constituted a "government financial activity and not a commercial activity."

Third, the District Court concluded that another provision of the FSIA, 28 U.S.C. § 1611(b)(1), provided a separate and independent basis for vacating the attachments and restraining orders. That statutory provision protects from attachment property "of a foreign central bank . . . held for its own account," unless the protection has been explicitly waived by the central bank or the bank's parent foreign government.[7] In the view of the District Court, the FRBNY Account "was, is, and continues to be the property of the central bank used for central banking functions," and therefore, "the prohibition of Section 1611 on attaching those funds must apply."

Fourth, the District Court rejected plaintiffs' arguments that there had been an explicit waiver of *BCRA's* immunity of the type that would be necessary to expose BCRA's assets to attachment under 28 U.S.C. § 1611(b)(1). The District Court also implicitly denied EM's discovery request by vacating the Amended Restraining Notices without authorizing further discovery.

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(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

[7] 28 U .S.C. § 1611(b)(1) provides, in pertinent part:

Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver . . . .

On January 24, 2006, the District Court entered a written order formally vacating the Amended Restraining Notices, staying the order pending appeal, and certifying the order for appeal pursuant to 28 U.S.C. § 1292(b).[8]

We expedited the appeal. The United States and the FRBNY have appeared before us as *amici* in support of the Republic and BCRA.

DISCUSSION

I. Appellate Jurisdiction

We have jurisdiction pursuant to 28 U.S.C. § 1292(b). The appeal was certified by the District Court, and we agree that the District Court's ruling involves unresolved controlling questions of law, and that an appeal would advance the termination of the litigation.[9]

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[8] 28 U.S.C. § 1292(b) provides, in pertinent part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

[9] Consequently, we formally grant plaintiffs' motion to hear the appeal pursuant to 28 U.S.C. § 1292(b). Having accepted jurisdiction under § 1292(b), we need not consider whether jurisdiction would also be proper under 28 U.S.C. § 1292(a)(1), which grants appellate courts jurisdiction over orders "refusing or dissolving injunctions," or under the collateral order doctrine. *See Karaha Bodas Co., L .L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 81 & n.11 (2d Cir. 2002) (considering appeal of orders related to attachment of assets of Indonesian national government and instrumentality under § 1292(b) without determining whether jurisdiction would also be proper under collateral order doctrine).

II. Standard of Review

We review a district court's ruling on a request for an order of attachment for abuse of discretion. *See Capital Ventures Int'l v. Republic of Argentina*, 443 F.3d 214, 222 (2d Cir. 2006) (addressing prejudgment attachment). We will find such an abuse of discretion if the district court "applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed[s] on the basis of an erroneous view of the applicable law." *Id.* (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 398 (2d Cir. 2004)); *see also Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) ("error of law" constitutes "abuse of discretion").

In this case, we consider the legal conclusions that underlay the District Court's exercise of discretion to vacate the attachments—namely, that the Republic had no attachable interest in the FRBNY Funds, and that the funds were otherwise immune from attachment under the FSIA. Thus, the dispositive issues here are ones of law, which we review *de novo*. *See Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 225 (2d Cir. 2006) (noting that this Court "will find an abuse of discretion whenever the district court commits an error of law, which we review *de novo*").

III. Analysis

We agree with the decision of the District Court. We conclude that the Decrees did not create an attachable interest on the part of the Republic in the FRBNY Funds, and that Section 1610's provisions allowing attachment of property of a foreign state "used for a commercial activity" would not permit attachment of the FRBNY Funds even if they were attachable assets of the Republic.

A. General Principles

The FSIA protects foreign states' property from attachment and execution, subject to existing international obligations, except under the conditions set forth in two other provisions of

the FSIA, 28 U.S.C. §§ 1610 and 1611. *See* 28 U.S.C. § 1609 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."); *Letelier v. Republic of Chile*, 748 F.2d 790, 793 (2d Cir. 1984) ("[U]nder [FSIA] § 1609 foreign states are immune from execution upon judgments obtained against them, unless an exception set forth in §§ 1610 or 1611 of the FSIA applies.").

The FSIA's protections against attachment and execution extend to the instrumentalities of a foreign state such as BCRA, although the protections applicable to assets of instrumentalities vary from those applicable to the assets of the foreign states themselves. *See Karaha Bodas*, 313 F.3d at 82 ("Section 1610 provides different regimes for sovereign states on the one hand, and their agencies and instrumentalities on the other."); *see also S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983) ("State-owned central banks indisputably are included in the [FSIA's] definition of 'agency or instrumentality.'"). Under subsections 1610(a) and (d), assets of a foreign state can be attached only *if the assets sought to be attached* are "used for a commercial activity in the United States." But under subsection 1610(b), which concerns agencies and instrumentalities of foreign states, creditors may attach "*any property in the United States* of an agency or instrumentality of a foreign state engaged in commercial activity in the United States," 28 U.S.C. § 1610(b) (emphasis added). As we explained in *Karaha Bodas*, "[s]ubsection (a) is generally thought to be narrower than subsection (b). While subsection (b) applies to *all* property of the agencies and instrumentalities of foreign states, subsection (a) applies only to the property of foreign states that is 'used in commercial activity.'" *Karaha Bodas*, 313 F.3d at 82 (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 253 (5th Cir. 2002)).

The FSIA provides additional protection to assets of foreign central banks. *See* 28 U.S.C. § 1611(b)(1), note 7, *ante*. Congress developed 28 U.S.C. § 1611(b)(1) to shield from attachment the U.S. assets of foreign central banks, many of which might be engaged in commercial activity in the United States while managing reserves and engaging in financial transactions, and to provide an incentive for foreign central banks to maintain their reserves in the United States:

> Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

H.R. Rep. No. 94-1487 ("FSIA House Report") at 31, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630; *see also* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 Colum. J. Transnat'l L. 327, 376 (2003) (noting that Section 1611(b)(1) appears to have been developed in order to avoid the "potential difficulties" that central banks would be faced with if their assets were subject to attachment under the provisions of Section 1610(b) applicable to other instrumentalities).

Plaintiffs' reliance on the attachment provisions applicable to foreign states—§ 1610(a) and its prejudgment counterpart, § 1610(d)—rather than on the attachment provisions applicable to foreign agencies and instrumentalities set forth in § 1610(b), makes clear that their arguments are premised on a threshold determination that the FRBNY Funds are an attachable interest of *the Republic*, not of BCRA.

B. The Decrees Did Not Convert the FRBNY Funds Into an Attachable Interest of the Republic

Although plaintiffs hold or seek judgments against the Republic, the FRBNY Funds that plaintiffs seek to attach are held in BCRA's name. Plaintiffs have conceded that: (1) before December 15, 2005, the date on which the Decrees were issued, the FRBNY Funds were the property of BCRA; (2) plaintiffs had no right to attach the FRBNY Funds before that date; and (3) even after issuance of the Decrees, the FRBNY Funds were held in BCRA's name. Thus, under New York law, it is presumed that the FRBNY Funds continue to be owned by BCRA even after issuance of the Decrees.[10] *See Karaha Bodas*, 313 F.3d at 86 ("Under New York law, the party who possesses property is presumed to be the party who owns it. When a party holds funds in a bank account, possession is established, and the presumption of ownership follows." (citing *Pollock v. Rapid Indus. Plastics Co.*, 497 N.Y.S.2d 45, 49 (2d Dep't 1985); *Kolodziejczyk v. Wing*, 689 N.Y.S.2d 825, 825 (4th Dep't 1999); and *Perkins v. Guar. Trust Co. of N.Y.*, 274 N.Y. 250, 261 (1937))).

Plaintiffs do not bring to our attention any contrary New York or Argentine legal principles governing ownership of funds in bank accounts, *see Karaha Bodas*, 313 F.3d at 85-86 (analyzing New York and Indonesian legal principles governing rights of Indonesian government and Indonesian instrumentality to funds held in New York bank accounts), nor do they point to any order or other document explicitly transferring ownership

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[10] Under the FSIA and the Federal Rules of Civil Procedure, New York law governs the circumstances and manner of attachment and execution proceedings. *See Karaha Bodas*, 313 F.3d at 83 ("The FSIA states that when a foreign state is not protected by sovereign immunity, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. § 1606. In attachment actions involving foreign states, federal courts thus apply Fed. R. Civ. P. 69(a), which requires the application of local state procedures."); *Capital Ventures Int'l v. Republic of Argentina*, 443 F.3d 214, 218-19 (2d Cir. 2006).

of the FRBNY Funds from BCRA to the Republic. Instead, plaintiffs contend that the Decrees changed the legal status of $8.4 billion of BCRA's reserves—*i.e.*, the funds that the Decrees designated as Unrestricted Reserves—when it made those funds available to pay the Republic's debt to the IMF. NML contends that the Decrees had the effect of making the Unrestricted Reserves property of the Republic. *See* Br. of Appellant NML 32-33. EM argues that it is immaterial whether the "nominal" holding and ownership of the Unrestricted Reserves changed, because under New York attachment law the Unrestricted Reserves are attachable if the Republic has a right to assign or transfer them. *See* Br. of Appellant EM 27-29 (citing N.Y. C.P.L.R. § 5201(b) ("A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested . . . .")). According to EM, the Unrestricted Reserves must be subject to attachment because the Decrees demonstrated the Republic's power to assign or transfer BCRA's assets. *See id.* at 27-28 ("Indeed, the fact that it was even *possible* for President Kirchner, with the stroke of a pen, to appropriate (or borrow) the Unrestricted Reserves to pay Argentina's debts and then direct when and how the payment should be made proves beyond question that the Argentine state controls not only the Unrestricted Reserves, but *all* of the Central Bank's assets.").

Plaintiffs also argue that the Decrees transformed all reserves of BCRA, including the FRBNY Funds, into attachable assets of the Republic because the Decrees did not specify *which* of BCRA's funds would be designated as Unrestricted Reserves and used to repay the IMF. *See* Br. of Appellant EM 31 ("The consequence of Argentina's deliberate decision to preserve all of its options with respect to paying its creditors out of its foreign exchange reserves, wherever located, is that all of the funds garnished by the Restraining Notices [including the FRBNY Funds] were Unrestricted Reserves."); Br. of Appellant NML 36 (arguing that the Decrees subjected to attachment "any portion of the reserves held by the Central Bank anywhere in the

world . . . unless and until the attachments became so large that they exceeded the Unrestricted Reserves").[11] According to plaintiffs, the FRBNY Funds must be treated as attachable Unrestricted Reserves because the Decrees failed to *exclude* the FRBNY Funds from being so designated. *See* Br. of Appellant EM 31-32 ("It makes no difference whether Argentina actually intended to pay the IMF from those funds, since the Decrees do not differentiate on that basis. To conclude otherwise would be to allow Argentina to utilize a problem of its own creation to evade its creditors.").

It is important to distinguish arguments which assert that the Decrees transferred to the Republic ownership or control over *the assets* of BCRA, *see, e.g.*, *Karaha Bodas*, 313 F.3d at 90-92 (analyzing foreign state's ownership rights in assets possessed by instrumentality), from arguments that turn on the Republic's control over *BCRA itself*. The legal principles governing when a foreign state's control over its instrumentality permits attachment of the instrumentality's assets to satisfy a judgment against the state are well-established, *see post*, but were not addressed by plaintiffs in their submissions to the District Court or to this Court.

We conclude that (1) the Decrees did not alter property rights with respect to the FRBNY Funds—the assets that are the subject of the present appeal—but merely reflect the Republic's ability to exert control over BCRA itself, and (2) plaintiffs have not availed themselves of any arguments that would allow

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[11] The scope of plaintiffs' claimed authority to attach assets held by BCRA would be vast. Even though only $8.4 billion in reserves were reclassified as Unrestricted Reserves pursuant to the Decrees, under plaintiffs' theory, *all* $26.8 billion in the various BCRA accounts around the world would be subject to attachment (until the attached funds reach $8.4 billion) because all that money would be *potentially* designated as Unrestricted Reserves—*i.e.*, because it is unclear *which* $18.4 billion would be classified as that necessary to back the monetary base and *which* $8.4 billion ($26 .8 billion minus $18.4 billion) would be classified as "Unrestricted Reserves."

attachment of the FRBNY Funds based on the Republic's control over BCRA.

1. Control Over the FRBNY Funds

Plaintiffs' arguments concerning ownership of, and control over, the FRBNY Funds are not supported by the Decrees. The record is barren of any evidence that ownership or control over the FRBNY Funds was transferred to the Republic upon issuance of the Decrees, or that the Decrees required BCRA to use the FRBNY Funds, as opposed to other reserves, to repay the IMF. Rather than transferring funds to the Republic from BCRA, the Decrees and Resolution No. 49 directed BCRA to make reserves available to repay the IMF, and then to repay the IMF using those funds, leaving the decision of which specific funds would be used to BCRA's discretion. *See, e.g.*, Reply Br. of Appellant NML 13-14 n.9 (acknowledging that "the Decrees fail to specify particular assets as Unrestricted Reserves").

While the Decrees may have manifested the Republic's ability and willingness to control BCRA, and to direct BCRA to use its assets for the benefit of the Republic, they did not cause control of BCRA's assets to change from BCRA to the Republic. To conclude otherwise would be to allow creditors of a foreign state to attach all of the assets of the state's central bank any time the foreign state issues directives affecting the central bank's reserves.[12] Corporate law principles, which apply

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[12] As the FRBNY points out, plaintiffs' theory could expose to attachment the assets of a majority of the world's central banks because national governments customarily retain the ability to direct their central banks to take actions with respect to the central banks' foreign exchange reserves. *See, e.g.*, M.H. de Kock, *Central Banking* 34-37, 312-18 (4th ed. 1974). Under plaintiffs' theory, for example, all of the assets of the United States Federal Reserve system would be treated as attachable interests of the United States (absent otherwise-applicable sovereign immunity protections) because the United States has exercised the power to direct the Federal Reserve Banks to transfer their "surplus funds" to the U.S. Treasury for use by the federal government. *See, e.g.*, 12 U.S.C. § 289(b)(1) ("The Federal reserve banks shall transfer from the surplus funds of such banks to the Board

by analogy to the relationship between the Republic and its instrumentality BCRA, *see, e.g.*, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-33 (1983) ("*Bancec*") (applying corporate law principles to determine circumstances under which separate juridical status of government instrumentality must be disregarded), support this conclusion. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475-76 (2003) (holding that the FSIA did not affect underlying corporate law principles, and stating that "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary . . . . The fact that the shareholder is a foreign state does not change the analysis." (citations omitted)); *United States v. Wallach*, 935 F.2d 445, 462 (2d Cir. 1991) ("[S]hareholders do not hold legal title to any of the corporation's assets. Instead, the corporation—the entity itself—is vested with the title." (citations omitted)); *see also* 1 William Meade Fletcher, Cyclopedia of the Law of Corporations § 31 at 78, 84 (rev. ed. 2006) ("Shareholders, even the controlling shareholder, cannot transfer or assign the corporation's properties and rights, nor apply corporate funds to personal debts or objects . . . ." (footnotes omitted)).[13]

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of Governors of the Federal Reserve System for transfer to the Secretary of the Treasury for deposit in the general fund of the Treasury, a total amount of $3,752,000,000 in fiscal year 2000.").

[13] New York attachment law does not help plaintiffs. We noted in *Karaha Bodas* that the scope of attachment authorized by N.Y. C.P.L.R. § 5201 was limited by the scope of the judgment debtor's own interest in the attached property: "In New York, then, a party seeking to enforce a judgment 'stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own.' Nonetheless, a party cannot 'reach . . . assets in which the judgment debtor has no interest.'" *Karaha Bodas*, 313 F.3d at 83 (quoting *Bass v. Bass*, 528 N.Y.S.2d 558, 561 (1st Dep't 1988)). Here, because plaintiffs have not demonstrated that the Republic obtained any attachable interest in the FRBNY Funds as a result of the Decrees, plaintiffs have no right to attach the funds.

2. Control over BCRA

To the extent that plaintiffs' claim on the FRBNY Funds is based on the Republic's control over BCRA, as demonstrated by the Decrees, *see, e.g.*, Br. of Appellant EM 27-28 (arguing that the Republic's ability to appropriate BCRA's assets "with the stroke of a pen . . . proves beyond question that the Argentine state controls not only the Unrestricted Reserves, but *all* of the Central Bank's assets"), plaintiffs have failed to avail themselves of well-established legal principles that might permit attachment. In *Bancec*, the Supreme Court stated that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-27. According to the Court,

> [f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated.

Id. at 626 (footnote omitted).

The Court found support for this proposition in the legislative history of 28 U.S.C. § 1610(b), *see* note 6, *ante* (quoting § 1610(b)), the provision of the FSIA addressing the circumstances under which a judgment creditor may execute upon the assets of an instrumentality of a foreign government:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage

> foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another.

Bancec, 462 U.S. at 627-28 (quoting FSIA House Report at 29-30, *as reprinted in* 1976 U.S.C.C.A.N. at 6628-29).

In *Bancec*, the Court held that the "presumption that a foreign government's determination that its instrumentality is to be accorded separate legal status will be honored," *id.* at 628, could be overcome under certain circumstances, including where the instrumentality is "so extensively controlled by its owner that a relationship of principal and agent is created," *id.* at 629, and where recognizing the instrumentality's separate juridical status would "work fraud or injustice," *id.* (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)) (internal quotation mark omitted); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984) ("The *Bancec* Court held that a foreign state instrumentality is answerable just as its sovereign parent would be if the foreign state has abused the corporate form, or where recognizing the instrumentality's separate status works a fraud or an injustice.").

Our respect for the separate juridical status of government instrumentalities led us to conclude in *Letelier* that the assets of Chile's state-owned airline, LAN, could not be executed upon to satisfy a judgment obtained against the Republic of Chile. *See Letelier*, 748 F.2d at 792, 799. We interpreted *Bancec* to establish a presumption that assets of a foreign government instrumentality could not be executed upon to satisfy a judgment against a parent foreign government. That presumption could be overcome only if the party seeking attachment carried its burden of demonstrating that the instrumentality's separate juridical status was not entitled to recognition. *See id.* at 794-95.

In *Letelier*, the district court had held that Chile's "direct control" of LAN's "assets and facilities," its power to use LAN's assets, its ability to "have decreed LAN's dissolution and taken over property interests held in LAN's name," and its use of the instrumentality's facilities and personnel to plan and carry out an assassination that gave rise to the judgment at issue in the case amounted to an abuse of corporate form justifying disregard of the instrumentality's separate juridical status. *Id.* at 794. We reversed, holding that

> [p]laintiffs had the burden of proving that LAN was not entitled to separate recognition. A creditor seeking execution against an apparently separate entity must prove the property to be attached is subject to execution. The evidence submitted by the judgment creditors does not reveal abuse of corporate form of the nature or degree that *Bancec* found sufficient to overcome the presumption of separate existence. As both *Bancec* and the FSIA legislative history caution against too easily overcoming the presumption of separateness, we decline to extend the *Bancec* holding to do so in this case.

Id. at 795 (citations and internal quotation marks omitted).

In a recent case, *LNC Invs., Inc. v. Republic of Nicaragua*, 115 F. Supp. 2d 358 (S.D.N.Y. 2000), *aff'd sub nom. LNC Invs., Inc. v. Banco Central de Nicaragua*, 228 F.3d 423 (2d Cir. 2000), a district court applied *Bancec* to defeat the efforts of LNC Investments ("LNC"), a judgment creditor of the Republic of Nicaragua ("Nicaragua"), to execute on assets of Nicaragua's central bank held in the FRBNY. In that case, LNC obtained a judgment against Nicaragua based on its holdings of defaulted debt instruments issued by Nicaragua. To satisfy the judgment, LNC sought to execute on assets of Banco Central de Nicaragua—Nicaragua's central bank—held in the FRBNY, contending that Nicaragua had waived immunity from attachment of its central bank's assets and, in the alternative, that the central bank could be required to satisfy the judgment against Nicaragua. *See id.* at 360-63.

The district court rejected LNC's waiver argument, *see id.* at 361-63, and held that the central bank could be required to satisfy the judgment against its parent sovereign government only if LNC could overcome the *Bancec* presumption that the central bank's separate juridical status must be respected, *see id.* at 363. It concluded that LNC failed to prove that Nicaragua abused the central bank's corporate form (*i.e.*, that the central bank was the "alter ego" of Nicaragua), or that respecting the central bank's separate juridical status would work a fraud or injustice. *See id.* at 363-66.

We affirmed in a brief opinion in which we expressed our agreement with the district court's reasoning. *See LNC Invs.*, 228 F.3d at 423 ("The district court held that the Central Bank's assets could not be reached to satisfy the judgment against Nicaragua. We agree and affirm for substantially the reasons stated by the district court."). This result has been described by a commentator as "consistent with the outcome in a series of prior appellate decisions that had shown a strong aversion to overriding the presumption of independent status for separate corporate agencies or instrumentalities." Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 Colum. J. Transnat'l L. 327, 364 (2003).[14] *See also First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (using *Bancec* to analyze claim that central bank of Iraq should be held liable

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[14] Lee cites *Letelier* and the following cases from the Fifth and Eleventh Circuits in support of this proposition: *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1281 (11th Cir. 1999); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 178-81 (5th Cir. 1989); and *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987). *See* Lee, *ante*, at 362 n.137, 365 n.144.

We note that *Banco Central de Reserva del Peru v. Riggs Nat'l Bank*, 919 F. Supp. 13 (D.D.C. 1994), which plaintiffs relied upon in their briefs and at oral argument, also applied *Bancec* to a claim against the assets of Peru's central bank by a creditor of Peru (in that case, a claim for setoff). *See id.* at 16 ("As a general rule, courts must give great deference to the intent of foreign governments to establish separate entities." (citing *Bancec*, 462 U.S. at 626-27)).

for Iraq-owned commercial bank's repudiation of debts as commercial bank's "alter ego"); *Olympic Chartering S.A. v. Ministry of Indus. and Trade of Jordan*, 134 F. Supp. 2d 528, 530 (S.D.N.Y. 2001) (rejecting claim by judgment creditor of Jordan's Ministry of Industry and Trade for jurisdictional discovery concerning the Central Bank of Jordan ("CBJ") because "petitioner has made no allegation that CBJ is an alter ego of the judgment debtor nor of 'fraud or injustice' involving CBJ" (quoting *Bancec*, 462 U.S. at 629)).

We see no reason why the presumption of separateness required by *Bancec* and applied in *Letelier* and *LNC Investments* should not apply here to shield the FRBNY Funds from attachment. The separate juridical status of BCRA is not disputed by plaintiffs,[15] and plaintiffs expressly elected not to

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[15] "A typical government instrumentality . . . is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *Bancec*, 462 U.S. at 624. BCRA satisfies this description. Appellees submitted below an uncontradicted affidavit stating that BCRA is an independent legal entity "charged by statute with the power and responsibility of issuing and monitoring the stability of the Argentine currency (the Argentine peso), establishing and implementing monetary policy, and regulating the Argentine banking system and financial sector." Aff. of Juan Bosco ¶ 3, J.A. 393. BCRA's statutory charter, Law No. 24,144/92 (Oct. 22, 1992, as amended) (the "Charter"), indicates that BCRA is a "self-administered institution of the [Republic]" managed by an independent Board of Directors appointed by the National Executive Power with the consent of the national Senate. Charter arts. 1, 6-7, J.A. 402-03. As an independent legal entity, BCRA has the legal authority to purchase and sell property in its own name, hold accounts in its own name, and sue and be sued in a court of law in its own name. Charter arts. 18, 33, 55, J.A. 407-08, 411, 414. In the District Court, plaintiffs did not dispute this characterization of BCRA's separate juridical status, and plaintiffs do not contest the statements in BCRA's appeal brief indicating that BCRA is a "'self-administered institution' whose independence from the Republic's executive branch is mandated by the Argentine Constitution and Argentine law," Br. of Appellee BCRA 2 (quoting Charter art. 1)—except to the extent that plaintiffs argue BCRA's formal independence is belied by the Republic's extensive control over the central bank.

argue in support of attachment that BCRA's separate juridical status should be disregarded because BCRA is the alter ego of the Republic. *See, e.g.*, Jan. 12, 2006 Hr'g Tr. 8, Special Appendix of Appellant EM 13 (counsel for EM acknowledging that the FRBNY Funds were "the central bank's property before the decree, subject to arguments which we think are legitimate arguments of ours that the central bank is the alter ego of the government. But that would still make it the central bank's property."); NML Reply Br. 21-22:

> The reason Central Bank assets were not available before December 15, 2005, [the date on which the Decrees were issued,] to be attached by *Argentina's* creditors is that the relevant debts are Argentina's and not the Central Bank's. Before President Kirchner decreed funds held by the Central Bank available to pay a debt of Argentina, appellants had no basis—*other than an alter ego argument, which they have not yet made in the District Court*—to argue that they were entitled to attach Central Bank funds to pay a debt of Argentina.

(citation omitted) (second emphasis added). Nor have they argued that the *Bancec* presumption should be overcome based on a finding that disregarding BCRA's separate juridical status is necessary to prevent fraud or injustice.[16] In fact, neither EM nor NML even so much as mentions *Bancec* in its briefs.

Furthermore, if plaintiffs believed that BCRA was not entitled to separate juridical status, they would not have needed to argue that the Decrees caused ownership or control of the FRBNY Funds to change from BCRA to the Republic upon issuance of the Decrees, because the FRBNY Funds would have been attachable assets of the Republic even before the Decrees were issued.

[16] This Court will not consider plaintiff's potential alter ego arguments in the first instance. *See Mellon Bank, N.A. v. United Bank Corp. of N.Y.*, 31 F.3d 113, 116 (2d Cir. 1994) (declining to review an argument not raised before the district court when the party "clearly had the opportunity to raise" it below).

We reject plaintiffs' effort to circumvent *Bancec* and our decisions in *Letelier* and *LNC Investments* by characterizing the Republic's ability and willingness to control BCRA as a transfer of property rights sufficient to give the Republic an attachable interest in the FRBNY Funds. Under *Bancec* and its progeny, plaintiffs bear the burden of overcoming the presumption that the FRBNY Funds are not available to satisfy a judgment against the Republic. *Bancec* indicates two circumstances in which the presumption may be overcome—if BCRA were proven to be the alter ego of the Republic, or if disregarding BCRA's separate juridical status were necessary to avoid fraud or injustice. Plaintiffs chose not to argue that either of these circumstances existed here, even though the Republic's alleged misdeeds cited in plaintiffs' briefs might have lent some credence to these arguments.[17] *Bancec* forecloses any argument that all of BCRA's $26.8 billion in reserves are "attachable interests" of the Republic merely because the Republic hypothetically *could have* ordered (but in the Decrees did not order) BCRA to assign or transfer the FRBNY Funds. *See Letelier*, 748 F.2d at 794 (findings that assets and facilities of Chile's instrumentality LAN "were under the direct control of Chile, which had the power to use them; [and that] Chile could have decreed LAN's dissolution and taken over property interests held in LAN's name" did not support allowing creditor to attach LAN's assets in order to satisfy judgment against Chile).

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[17] For example, the Republic's alleged interference with BCRA's affairs and efforts to remove attachable assets from the United States arguably could have supported arguments for disregarding BCRA's separate juridical status in order to avoid fraud or injustice. This approach, rather than the legally unsupported one advanced by plaintiffs, might provide a means by which creditors could "avoid allowing Argentina to play a shell game to deprive creditors of their legitimate remedies." Br. of Appellant NML 36.

C. Use of Funds To Repay the IMF Is Not a "Commercial Activity"

Even if we agreed that the Decrees effectively converted all of BCRA's reserves—including the reserves held in the FRBNY Account—into attachable assets of the Republic, we could not authorize the pre- or postjudgment attachment of the FRBNY Funds unless we found that the account had become property of the Republic "used for a commercial activity in the United States."[18] 28 U.S.C. §§ 1610(a) & (d); *see* note 6, *ante* (quoting relevant portions of § 1610). Plaintiffs essentially concede as much by arguing that the Unrestricted Reserves are attachable because they were "used for a commercial activity." *See* Br. of Appellant EM 32-36 (arguing that Unrestricted Reserves are attachable because they have been "used for a commercial activity"); Br. of Appellant NML 37-47 (same).[19]

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[18] We note, however, that if we agreed with plaintiffs' arguments concerning the effect of the Decrees on ownership and control of the FRBNY Funds, it would not be necessary to consider plaintiffs' arguments regarding the effect of the Republic's waiver on BCRA, as the Republic indisputably waived its assets' immunity from attachment under 28 U.S.C. §§ 1610(a)(1) and (d)(1). *Cf. Rafidain Bank*, 150 F.3d at 174 (noting that if central bank were alter ego of other instrumentality, central bank would be subject "to jurisdiction under the FSIA's commercial activity exception to immunity to the same extent as [the other instrumentality]").

[19] Plaintiff EM does argue in the alternative that the FRBNY Funds should not be immune from attachment because the Republic "went beyond merely waiving the immunity of those Reserves in the documents underlying [its] bond; it affirmatively pledged *not to assert* such immunity in proceedings to enforce the Judgment." Br. of Appellant EM 46 (emphasis in original). EM relies on *Caribbean Trading and Fid. Corp. v. Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111 (2d Cir. 1991), in support of this argument.

EM's argument is without merit. As stated earlier, the Republic "irrevocably agreed not to claim and has irrevocably waived . . . immunity to the fullest extent permitted by the laws of [the] jurisdiction . . . ." By its explicit terms, the scope of the Republic's agreement not to claim immunity is coextensive with its waiver of immunity; both reach only to the "extent permitted under the laws of [the] jurisdiction." The FSIA explicitly protects all "property in the United States of a foreign state . . . from attachment arrest

Plaintiffs contend that the Republic's use of the FRBNY Funds constituted "a commercial activity in the United States" under 28 U.S.C. § 1610(a) because the funds could have been used to repay the Republic's debt to the IMF. They rely on *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), in which the Supreme Court held that Argentina's issuance of commercial bonds constituted "commercial activity" under the FSIA, *see id.* at 615-17, to argue that a government's repayment of debt *always* constitutes "commercial activity" within the meaning of the FSIA. Under this reasoning, the Republic

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and execution except as provided in" 28 U.S.C. §§ 1610 & 1611. 28 U.S.C. § 1609. Under the laws of this jurisdiction, courts may grant the remedies of attachment, arrest and execution against a foreign state's property only if the property is eligible for attachment under a specific provision of the FSIA. *See, e.g., Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002) ("[I]f a foreign sovereign waives its immunity from execution, U.S. courts may execute against 'property in the United States . . . used for a commercial activity in the United States.' 28 U.S.C. § 1610(a)(1). Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria."); *accord LNC Invs., Inc. v. Republic of Nicaragua*, No. 96 Civ. 6360 (JFK), 2000 WL 745550, at *3 (S.D.N.Y. June 8, 2000). To conclude otherwise would render meaningless the provisions of §§ 1610(a) & (d), which subject to attachment property of a foreign state when the property is "used for a commercial activity" *and* when the foreign state "has waived its immunity from attachment," 28 U.S.C. § 1610(a)(1); *see also id.* § 1610(d)(1) (permitting prejudgment attachment of a foreign state's property "used for a commercial activity" only where "the foreign state has explicitly waived its immunity from attachment prior to judgment").

Caribbean Trading does not support a contrary conclusion. In *Carribean Trading*, we found that a foreign state instrumentality waived the right to assert immunity from attachment provided by the FSIA by failing to timely assert it in the litigation in accordance with procedural rules governing all litigants. *See Caribbean Trading*, 948 F.2d at 115. We noted, however, that "[t]his wholly procedural rule does not infringe on the prerogatives of a foreign state under the FSIA. It merely imposes orderly procedures upon the assertion of those prerogatives." *Id.* We need not consider here what remedy, if any, a judgment creditor might have against a foreign state that violated an explicit promise not to assert any of the non-waivable protections of the FSIA in attachment proceedings, because the Republic did not make any such promise to plaintiffs.

engaged in "commercial activity" when BCRA repaid the Republic's debt to the IMF.

We disagree with plaintiffs' argument on two separate and independent grounds. First, we hold that the Republic's relationship with the IMF is not "commercial" in nature; thus, use of Unrestricted Reserves to repay the IMF did not constitute "commercial activity." Second, even if we assumed that the Republic's relationship with the IMF was "commercial" in nature, plaintiffs have failed to show on the present record that any of the FRBNY Funds were to be "used" to pay the IMF.

The FSIA's definition of "commercial activity" states that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). According to the Supreme Court in *Weltover*, "[a] foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns'; rather, it 'exercise[s] only those powers that can also be exercised by private citizens.'" 504 U.S. at 614 (second and third alterations in original) (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality opinion)). This led the Court to conclude that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA. . . . [T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.* (quoting Black's Law Dictionary 270 (6th ed. 1990)). The Court concluded in *Weltover* that Argentina engaged in "commercial activity" within the meaning of the FSIA when it issued commercially-available debt instruments, because the instruments were "in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market

(except in Argentina); and they promise a future stream of cash income." *Id.* at 615.

The Republic's borrowing relationship with the IMF, and the repayment obligations assumed thereunder, are not similarly "commercial" for several reasons. First, when the Republic borrows from the IMF, it "exercise[s] powers peculiar to sovereigns." *Id.* at 614. The IMF is a unique cooperative international institution established by treaty—the Bretton Woods Agreement—following the end of the Second World War. *See* Articles of Agreement of the IMF, 60 Stat. 1401, T.I.A.S. 1501 (Dec. 27, 1945). The Bretton Woods Agreement has since been amended twice, most recently in 1976, *see* Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 ("IMF Agreement"), *available at* http://www.imf.org/external/pubs/ft/aa/aa.pdf.[20] Only sovereign nation states can become members of the IMF, *see* IMF Agreement art. II, 29 U.S.T. at 2205-06, and only members can avail themselves of IMF financing, *see id.* arts. IV-V, 29 U.S.T. at 2208-20. The Republic is one of 184 sovereign nations that are members of the IMF. *See* IMF, *Members' Quota and Voting Power*, http://www.imf.org/external/np/sec/memdir/members.htm.

Second, the IMF's borrowing program is part of a larger regulatory enterprise intended to preserve stability in the international monetary system and foster orderly economic growth. *See* IMF Agreement art. IV § 1, 29 U.S.T. at 2208 (describing requirement that each member "undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of

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[20] The United States Governor of the IMF was given statutory authority to accept the amendments by the Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 249-50 (1984) (discussing 1976 amendments to the Bretton Woods Agreement).

exchange rates"); *id.* § 3, 29 U.S.T. at 2209 (granting the IMF the power "to oversee the international monetary system in order to ensure its effective operation" by "exercis[ing] firm surveillance over the exchange rate policies of members"). The Republic's borrowing relationship with the IMF is regulatory in nature because the IMF's provision of foreign currency or IMF-specific assets in exchange for domestic currency, *see post* (discussing unique nature of IMF loan arrangements), generally requires regulatory action by the Republic. *See Fact Sheet—IMF Lending*, http://www.imf.org/external/np/exr/facts/howlend.htm ("An IMF loan is usually provided under an 'arrangement,' which stipulates the specific policies and measures a country has agreed to implement to resolve its balance of payments problem."); *see also* Sandra Blanco & Enrique Carrasco, *The Functions of the IMF and the World Bank*, 9 Transnat'l L. & Contemp. Probs. 67, 75 (1999) (describing IMF loans beyond a minimum size as entailing "the explicit commitment by the member country to implement remedial measures in return for IMF assistance . . . . Those measures typically have related to the domestic money supply, budget deficits, international reserves, external debt, exchange rates, and interest rates."). The Republic agreed to many economic policy and regulatory reform measures in exchange for the IMF loans that were ultimately repaid in 2005. *See* IMF Independent Evaluation Office, *The IMF and Argentina, 1991–2001* 17-38 (2004) (describing and evaluating IMF's efforts to influence Argentina's exchange rate and fiscal policies, and to encourage structural reforms, in exchange for providing Argentina access to IMF capital); *see also Weltover*, 504 U.S. at 614 (concluding that "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party").[21]

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[21] We do not mean to imply that a loan becomes non-"commercial" any time a sovereign debtor agrees to take regulatory actions in connection with the receipt of the loan—for example, in order to become more attractive to

Third, the terms and conditions of the Republic's borrowing relationship with the IMF are not governed by a "garden-variety debt instrument[ ]," *id.* at 615, but instead by the Republic's treaty obligations to the international organization, as supplemented by the terms and conditions contained in agreements associated with individual loans. If the Republic failed to comply with these obligations, it would be in breach of the IMF Agreement and as a result could lose its rights to use IMF borrowing facilities, participate in IMF governance, and ultimately, remain a member of the IMF. *See* IMF Agreement art. V § 5, 29 U.S.T. at 2213; *id.* art. XXVI § 2, 29 U.S.T. at 2254. The vehicle for enforcing the Republic's obligations to the IMF is diplomatic and thus sovereign, not commercial. *See MCI Telecommunications Corp. v. Alhadhood*, 82 F.3d 658, 663 (5th Cir. 1996) ("We find that alleged promises made through diplomatic channels do not constitute commercial activity.").

Fourth, IMF loans are structured in a manner unique to the international organization, and are not available in the commercial market. Instead of obtaining currency in exchange for debt instruments, IMF debtors purchase "Special Drawing Rights" ("SDRs") or other currency from the IMF *in exchange for their own currency*. *See* IMF Agreement art. V § 2(a), 29 U.S.T. at 2210 (stating that, with certain exceptions, "transactions on the account of the Fund shall be limited to transactions for the purpose of supplying a member, on the initiative of such member, with special drawing rights or the currencies of other members from the general resources of the Fund . . . in exchange for the currency of the member desiring

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potential lenders, or in order to satisfy terms and conditions of the loan. *Cf. Weltover*, 504 U.S. at 616 (rejecting argument that Argentina's issuance of bonds was non-commercial because the bonds were created "under a foreign exchange program designed to address a domestic credit crisis"). We merely point out that the relationship between the Republic and the IMF, a multilateral organization, is non-commercial in a way that the Republic's relationship with commercial lenders cannot be because of the unique role that the IMF plays in regulating the international monetary system by intervening in the economies of its members.

to make the purchase"); *id.* art. XVII §§ 2-3, 29 U.S.T. at 2239-40 (discussing who may hold SDRs); *see also* Blanco & Carrasco, *ante*, at 74 ("Although the IMF's assistance is usually referred to as 'lending' or 'loans,' a member country actually 'purchases' SDRs or other currencies from the Fund in exchange for its own currency and agrees to 'repurchase' (buy back) its own currency at a later date."). Because a nation state's borrowing relationship with the IMF takes place outside of the commercial marketplace, it cannot be considered "commercial" in nature. *Compare Weltover*, 504 U.S. at 617 (holding that Argentina "participated in the bond market in the manner of a private actor" when it issued bonds).

Even if we were to regard repayment of IMF debts as "commercial activity" within the meaning of §§ 1610(a) and (d), we would be required to hold that, on the present record, the FRBNY Funds are not available for attachment under § 1610 because the FRBNY Funds were never "*used for* commercial activity," and plaintiffs presented no evidence to the District Court that the Republic or BCRA intended the FRBNY Funds to be so designated. *See* 28 U.S.C. § 1610(a) (requiring attachable property to be "*used for* a commercial activity" (emphasis added)); *id.* § 1610(d) (same as to prejudgment attachment). We need not define the precise contours of "used for" within the contemplation of § 1610 because there is no evidence that either actual use or designation for use occurred here with respect to the FRBNY Funds. The mere fact that the FRBNY Funds *could have* been used to repay the Republic's debts to the IMF after the Decrees does not, standing alone, render those funds attachable. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 254 (5th Cir. 2002) (noting that the phrase "used for" in § 1610(a) "means what it says: property of a foreign sovereign . . . may be executed against only if it is 'used for' a commercial activity"). The plain language of the statute suggests that the standard is actual, not hypothetical, use. *See Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 236 (5th Cir. 2004) (property not "used for" reimbursement of legal expenses where agreements never

moved beyond negotiation stage). Even if actual use were not required, at least specific designation for such use would be necessary. *Cf. Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 370 (5th Cir. 2004) ("Although . . . contemplated use is not actual use, it is strongly suggestive that the [funds at issue] were not cordoned off for use of [the state] in its sovereign capacity." (footnote omitted)).

Here, though, the Decrees made *all* BCRA funds *potentially* available for the repayment of the Republic's debts, and never specified which funds would be used to back the monetary base and which funds would be designated Unrestricted Reserves. Accordingly, plaintiffs cannot demonstrate on the basis of the Decrees alone that the FRBNY Funds were intended to be "used for" repaying the IMF.

D. The FRBNY Funds Are Immune From Attachment Even Without Reference to Section 1611(b)(1)

The parties have offered a variety of interpretations of 28 U.S.C. § 1611(b)(1)'s provision granting immunity from attachment for property "of a foreign central bank . . . held for its own account," provided that the central bank's immunity is not "explicitly waived." 28 U.S.C. § 1611(b)(1). But because the FRBNY Funds have remained assets of BCRA that cannot be used to satisfy a judgment against the Republic, we need not decide which interpretation of § 1611(b)(1)'s "held for its own account" language is correct in order to resolve this appeal. Section 1611(b)(1) provides a central bank with special protections from a judgment creditor who would otherwise be entitled to attach *the central bank's funds* under 28 U.S.C. § 1610. *See* 28 U.S.C. § 1611(b)(1) (protecting from attachment assets of a central bank "[n]otwithstanding the provisions of section 1610"). We have already held that plaintiffs have not established their right to attach the FRBNY Funds. Thus, even assuming *arguendo* that the FRBNY Funds were not "held for [BCRA's] own account," or that the Republic explicitly waived

BCRA's immunity from attachment,[22] plaintiffs would remain unable to attach the FRBNY Funds.

Our interpretation of Section 1611(b)(1) is in accord with the district court's opinion in *LNC Investments*, which found persuasive the Nicaraguan central bank's argument that its assets could not be attached to satisfy a judgment against Nicaragua even if Nicaragua waived the central bank's immunity from attachment:

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[22] Without reaching these issues, we note that there is little support for plaintiffs' arguments that the FRBNY Funds were no longer held for BCRA's "own account" upon issuance of the Decrees, or that BCRA's immunity from attachment was explicitly waived. With respect to § 1611(b)(1)'s "held for its own account" language, central banks regularly execute transactions with the IMF on behalf of their parent governments; IMF members are required to designate a fiscal agent for financial transactions with the IMF, and the vast majority of members designate their respective central banks. *See* IMF Agreement art. V, § 1, 29 U.S.T. at 2210; IMF Treasurer's Department, Pamphlet No. 45, *Financial Organization and Operations of the IMF*, at 84 (6th ed. 2001) (noting that "most members of the IMF have designated their central bank as . . . the fiscal agency"). Thus, the legislative history of Section 1611(b)(1), discussed *ante*, would support the conclusion that even if BCRA had decided to use the FRBNY Funds to repay the IMF, the funds would continue to be held for BCRA's "own account," 28 U.S.C. § 1611(b), because the funds would be "used or held in connection with central banking activities," FSIA House Report at 31, *as reprinted in* 1976 U.S.C.C.A.N. at 6630.

Turning to plaintiff's waiver arguments, although the Republic's waiver of immunity from attachment is worded broadly, it does not appear to clearly and unambiguously waive BCRA's immunity from attachment, as it must do in order to be effective. *See Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47, 49 (2d Cir. 1982) (requiring explicit waiver of immunity from prejudgment attachment under 28 U.S.C. § 1610(d) to be "clear and unambiguous"). The Republic's waiver of immunity mentions certain reserves that are held by BCRA, but it makes no mention of BCRA itself, and does not state that it is waiving BCRA's immunity from attachment. *See* 28 U.S.C. § 1611(b)(1) (waiver only effective with respect to a "bank or authority" if it, "or its parent foreign government, has explicitly waived *its* immunity from attachment in aid of execution" (emphasis added)).

> [a]lthough a parent government may waive the immunity of its central bank pursuant to § 1611, nothing in the clear language of § 1611 remotely suggests that such a waiver automatically renders a central bank liable for a judgment entered against its parent government. Section 1611 simply demonstrates that the assets of a foreign bank can be attached and executed to satisfy a judgment entered *against that foreign central bank* when, and only when, the central bank or its parent government has made an explicit waiver of the bank's immunity.

LNC Invs., Inc. v. Republic of Nicaragua, 115 F. Supp. 2d 358, 362-63 (S.D.N.Y. 2000) (alteration and emphasis in original), *aff'd sub nom. LNC Invs., Inc. v. Banco Central de Nicaragua*, 228 F.3d 423 (2d Cir. 2000); *see also* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 Colum. J. Transnat'l L. 327, 395 (2003) ("[W]hether or not the central bank has explicitly waived immunity and whether or not the funds constitute funds held for the central bank's own account, property of the central bank will be subject to attachment or execution only for claims against the central bank and not for claims that pertain only to the government or its other agencies and instrumentalities.").

E. The District Court Properly Denied EM's Discovery Request

We are mindful that a federal trial court has wide latitude over the management of discovery, *see Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004), but in the FSIA context, "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992) (internal quotation marks omitted)); *cf. Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation."). Because the record makes clear that the FRBNY

Funds were never an attachable asset of the Republic and that § 1610's "commercial activity" exception to immunity from attachment does not apply, EM was "not entitled to any other discovery," as it has failed to "show[ ] a reasonable basis for assuming jurisdiction" over BCRA. *Rafidain Bank*, 150 F.3d at 177 (quoting *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990)). There is no indication on this record that the District Court improperly calibrated the "delicate balancing 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery.'" *Id.* at 176 (quoting *Arriba*, 962 F.2d at 534).

CONCLUSION

For the reasons stated above, plaintiffs' motion for certification of the appeal pursuant to 28 U.S.C. § 1292(b) is granted. The order of the District Court vacating the Amended Restraining Notices is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EM LTD.,		
Plaintiff,	:	03 Civ. 2507 (TPG)
-against-	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	
NML CAPITAL, LTD.,		
Plaintiff,	:	03 Civ. 8845 (TPG)
-against-	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	
NML CAPITAL, LTD.,		
Plaintiff,	:	05 Civ. 2434 (TPG)
-against-	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	

ORDER VACATING ATTACHMENTS AND RESTRAINING NOTICES, CERTIFYING THE VACATUR ORDER FOR APPEAL AND STAYING VACATUR PENDING APPEAL

WHEREAS, on December 30, 2005, this Court (Honorable Barbara S. Jones, USDJ) issued *Ex Parte* Orders of Attachment and Temporary Restraining Orders ("Attachments") in the actions brought by Plaintiff NML Capital, Ltd. ("NML"), and

Restraining Notices in the action brought by Plaintiff EM Ltd. ("EML," together with NML, the "Plaintiffs"), which were served on that same day on the New York branches or offices of eight garnishee banking and/or financial institutions (such New York branches or offices hereinafter referred to as the "Garnishees"): The Federal Reserve Bank of New York ("FRBNY"); Deutsche Bank Trust Company; Credit Suisse First Boston; Citibank, N.A.; American Express Bank, Ltd.; Bank of New York; Banco de la Nación Argentina; and JPMorgan Chase & Co.; and

WHEREAS, the Attachments and Restraining Notices relate in part to property in accounts of third-party Banco Central de la República Argentina (the "Central Bank") in New York held by or located at the Garnishees; and

WHEREAS, Defendant The Republic of Argentina ("Argentina") and the Central Bank moved on January 6, 2006, by order to show cause, to vacate the Attachments and Restraining Notices; and

WHEREAS, the Court held a conference on January 6, 2006; and

WHEREAS, the Parties executed and the Court entered a Stipulation and Consent Order on January 9, 2006, modifying the scope of the Attachments and Restraining Notices as requested by the Court during the January 6, 2006 conference; and

WHEREAS, the Plaintiffs moved on January 10, 2006, by order to show cause, to confirm the Attachments and Restraining Notices as modified by the January 9, 2006 Stipulation and Consent Order; and

WHEREAS, on January 12, 2006, the Court heard argument on Plaintiffs' motions to confirm the Attaches and Restraining Notices as modified by the January 9, 2006 Stipulation and Consent Order, and the motions of Argentina

and the Central Bank to vacate the Attachments and Restraining Notices; and

WHEREAS, the Court ruled that the Attachments and Restraining Notices, as modified by the January 9, 2006 Stipulation and Consent Order, should be vacated for the reasons stated on the record at the January 12, 2006 hearing (the "Vacatur Order"); and

WHEREAS, at the end of the January 12, 2006 hearing, the Plaintiffs moved orally (1) to stay the effect of the Vacatur Order pending an appeal from that Order, and (2) to certify the Vacatur Order for appeal pursuant to 28 U.S.C. § 1292(b), both of which motions the Court granted orally at the January 12, 2006 hearing; it is therefore and hereby

ORDERED, that the motions of Argentina and the Central Bank to vacate the Attachments and Restraining Notices are GRANTED; the motions of the Plaintiff to confirm the Attachments and Restraining Notices as modified by the January 9, 2006 Stipulation and Consent Order are DENIED; and the Attachments and Restraining Notices as modified by the January 9, 2006 Stipulation and Consent Order are VACATED; and it is further

ORDERED, that the Plaintiffs' motion to stay the effect of the Vacatur Order pending an appeal of that Order is GRANTED on condition that Plaintiffs seek an expedited appeal on a schedule agreed to with Argentina and the Central Bank; and the effect of the Vacatur Order is hereby STAYED pending the final disposition of such appeal; and it is further

ORDERED, that the Plaintiffs' motion to certify the Vacatur Order for appeal pursuant to 28 U.S.C. § 1292(b) is GRANTED, and in the event the Court of Appeals concludes that the Vacatur Order is not otherwise appealable under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a), this Court finds that the criteria for appeal pursuant to 28 U.S.C. § 1292(b) are met; and it is further

ORDERED, that the Clerk of Court shall file all of the following papers under seal, with the corresponding docket entries setting forth only the date of the filing and the statement "Document Filed Under Seal":

1. All papers submitted in connection with EML's *Ex Parte* Motion for Court-Issued Restraining Notices Directed to Assets Held for Argentina By Its Central Bank;

3.[sic] All papers submitted in connection with NML's *Ex Parte* Motion for an Order of Attachment;

4. All Restraining Notices entered by Judge Jones in EML's lawsuit on December 30, 2005;

5. All *Ex Parte* Orders of Attachment and Temporary Restraining Orders entered by Judge Jones in NML's lawsuits on December 30, 2005;

6. All garnishee statements filed by the Garnishees in connection with these actions between December 30, 2005 and the date of this Order, and all garnishee statements filed by the Garnishees in connection with these actions between the date of this Order and the final disposition of any appeal of the Vacatur Order;

7. The transcript of the hearing held in these actions at 4:00 p.m. on January 6, 2006;

8. The Stipulation and Consent Order entered by this Court on January 9, 2006;

9. All papers filed in connection with Argentina's Motion, by Order to Show Cause, to Vacate *Ex Parte* Restraining Notices and Orders of Attachment;

10. All papers filed in connection with the Central Bank's Motion, by Order to Show Cause, to Vacate *Ex Parte* Restraining Notices and Orders of Attachment;

11. All papers filed in connection with the Plaintiffs' Motion to Confirm Attachment and Restraining Orders and in Opposition to Motions of the Republic of Argentina and Banco Central de la República Argentina to Vacate Those Orders;

12. All submissions by any third party in connection with the Attachments and Restraining Notices;

13. The transcript of the hearing held in these actions at 4:00 p.m. on January 12, 2006; and

14. This Order.

Dated: January 24, 2006

SO ORDERED,

/s/
Thomas P. Griesa
U.S.D.J.

APPENDIX C

61ctemla Argument

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EM LTD.,
Plaintiff,
v. 03 CV 2507 (TPG)
THE REPUBLIC OF ARGENTINA,
Defendant.

----------x

NML CAPITAL, LTD.,
Plaintiff,
v. 03 CV 8845 (TPG)
THE REPUBLIC OF ARGENTINA,
Defendant.

----------x

NML CAPITAL, LTD.,
Plaintiff,
CORRECTED
v. 05 CV 2434 (TPG)
THE REPUBLIC OF ARGENTINA,
Defendant.

----------x

New York, N.Y.
January 12, 2006
4:00 p.m.

Before:
HON. THOMAS P. GRIESA,
District Judge

APPEARANCES

DEBEVOISE & PLIMPTON
Attorneys for Plaintiff EM Ltd.
BY: DAVID W. RIVKIN
DENNIS HRANITZKY
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DECHERT
Attorneys for Plaintiff NML Capital, Ltd.
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MICHAEL J. BYARS

SULLIVAN & CROMWELL, LLP
Attorneys for Banco Central de la Republica Argentina
BY: JOSEPH E. NEUHAUS
LAURENT STEPHAN WIESEL

(In open court)

THE COURT: What we have today is a motion by the Republic of Argentina to vacate an order of attachment signed by the partnering judge on December 30, that is Judge Jones, an order of attachment in favor of NLM Capital and restraining notice which Judge Jones approved for service, and she entered that order in favor of EM Limited against the Republic of Argentina. And there have been proceedings since then, and they're on the record and there's no reason to take time to summarize all that.

So we come right to the issue about –

MR. RIVKIN: Your Honor, I apologize for interrupting. David Rivkin representing EM Limited.

You also have before you our motion to confirm the attachment and restraining orders that was put onto the same timetable, so both motions are pending.

THE COURT: Exactly.

MR. RIVKIN: Since you were setting up the record I wanted to make that clear.

THE COURT: Now look, extensive papers have been filed and so it's really up to the lawyers what you think ought to be discussed in the arguments, and I'll really leave that to you, and if I feel that it's redundant with what I have read or considered, I'll step in, but who wants to lead off?

MR. RIVKIN: Since it's our attachment.

MR. NEUHAUS: It's our motion.

THE COURT: We have two motions. Let's hear the affirmative in favor of the attachment.

MR. RIVKIN: Thank you, your Honor. I'll speak from here if that's okay.

THE COURT: As long as you speak loudly.

MR. RIVKIN: I think you can hear me. I have done it before. If you need me to speak up, let me know.

Your Honor, I appreciate that you read the papers and that they are voluminous and they go through our arguments in some detail, so I will not repeat everything that is there. We have been before you on other issues in this case and you're well aware of the importance of this particular proceeding.

Your Honor, there is no question here that if what you had was a regular deadbeat debtor who owed many creditors money and that creditor gave instructions to a bank to pay off – if that debtor gave instructions to a bank to pay off one of its creditors in a few days and we served, representing another creditor, papers on that bank attaching the property of that deadbeat debtor, there is no question that an attachment in those circumstances would be a valid, effective attachment, and that the money to be paid to another creditor would instead be the proper subject of the attachment and therefore properly payable to the creditors who served the attachment. That is straightforward Hornbook Law under New York Law. There's no

question about that. And I don't think Argentina or the central bank can raise any question about that.

All they can do and have done in their papers is say: Wait, this is different, because the deadbeat debtor is Argentina, and the bank that they happen to be using to make this payment is the central bank. And your Honor, for the reasons we have briefed to you, those facts don't make a difference. This payment was not –

THE COURT: Well, in all fairness, they're not quite as simplistic.

MR. RIVKIN: Well, they are. They say – the only difference between the situation I described and this one is that they say the money was paid pursuant to an ordinary central bank activity and that is covered by immunity under the Foreign Sovereign Immunity Act.

And your Honor, there is a very simple answer to that. And that is if this were an ordinary central bank activity and a routine activity that is covered by that immunity, then why did they need an executive decree in order to implement that? If this were an ordinary activity, they could have gone about and paid. But they didn't, your Honor, they needed an executive decree by the president, a stroke of the pen. You have heard, your Honor, for years from Mr. Blackman about how poor they are, about how they can't pay off all their debts. But Argentina chose in December to pay off one very large

creditor, the IMF, and they chose to pay them more than $9 billion, and they did that with the stroke of a pen. The president issued a decree, signed it, and lo and behold, the funds were there at the central bank to be paid to the IMF. And that stroke of the pen showed both that Argentina has the money to pay other creditors –

THE COURT: Let's focus on the specific language of the decree, and that is quoted – just refresh my memory, is it in your memorandum?

MR. RIVKIN: It is Attachment Number 1 of the declaration of Mr. Hranitzky.

THE COURT: Is it quoted in your memorandum?

MR. RIVKIN: Yes. I tell you the best description of it is actually in the brief by the central bank where they say that the executive decree modified the convertibility law to allow the application –

THE COURT: Where are you reading from?

MR. RIVKIN: I am reading from their brief at page six, their first brief. The decree itself is Exhibit 1 to the original Hranitzky declaration as well.

THE COURT: Where is the language? What was the status before the decree? And I'm talking about property, but whose property was the money in the central bank? Whose property was it?

Because I mean obviously there are foreign sovereign

immunity questions, but you don't even get to them until you get past property questions. And the only thing that can be attached or restrained is property or assets of the Republic, Republic is the debtor. So what was the status before the decree?

MR. RIVKIN: Your Honor, the status, the money held by the central bank before the decree was either the central bank's or Argentina's. But you don't need to decide which, we –

THE COURT: Yes, I do need to decide, I want to know what it was before.

MR. RIVKIN: We believe it was Argentina's. We believe –

THE COURT: You think it was Argentina's all along.

MR. RIVKIN: We believe it was Argentina's all along.

THE COURT: Then the decree didn't make a change.

MR. RIVKIN: It made a critical change. That is why I say you don't have to decide what the status –

THE COURT: Please don't tell me what I have to decide. I want to have that firmly in mind to see whether there was a change by the decree. Because you are relying on that a lot. The decree didn't change anything. That is a very important circumstance.

MR. RIVKIN: I understand. Your Honor, the money held by the central bank before the decree was used to support its

monetary functions.

THE COURT: Whose property was it?

MR. RIVKIN: The money – it was the central bank's property before the decree, subject to arguments which we think are legitimate arguments of ours that the central bank is the alter ego of the government. But that would still make it the central bank's property.

THE COURT: The central bank's property before the decree. What is the language in the decree that changed that, if it did?

MR. RIVKIN: What the decree did – I'm reading from page four of the bank's brief on the bottom paragraph.

THE COURT: What article of the decree?

MR. RIVKIN: Well, the decree is very short. It's the article – it's the paragraph on the first page of the decree, the second paragraph from the bottom, your Honor, where it says: It is deemed appropriate to provide that the reserves in excess of the percentage that may be allocated for payment of obligations undertaken with international monetary authorities as long as those transactions result in a neutral monetary effect.

Then the decree says that – sorry, Article I of the decree on page two, by the president, with his stroke of the pen, says changes the convertibility law by making the reserves of the central bank up to 100 percent of the monetary base, and

the assets that constitute the reserves, in addition to those, that amount needed to support the monetary base, became the property of Argentina so that Argentina could pay.

THE COURT: Where are you reading now?

MR. RIVKIN: I'm reading that from the bottom of Article VI on the second page of the decree and the top.

THE COURT: Where does it say this becomes the property of the Republic?

MR. RIVKIN: It says as long as the monetary effect is neutral -- I'm reading at the top of page three – as long as the monetary effect is neutral, the unrestricted reserves, meaning the reserves that are not held for the monetary function, may be used for payment of obligations undertaken with international monetary authorities.

Your Honor, those obligations undertaken with international monetary authorities are the government's obligations, they are not the central bank's obligations. So what the decree said, and now I'm quoting, because it's a simple way of describing it, but it's not my words, it's Mr. Neuhaus's words: What the decree did was modify the convertibility law to allow the application of the bank's reserves in excess of the monetary base to pay debts owed to international financial bodies such as the IMF, as long as the monetary payment of such payment was neutral.

So what the decree did is took that excess and

Argentina said: That's ours, that's not the central bank's. And they used about $8 billion of that to pay off the IMF, I might add after our attachment served on the central bank, but on the Fed and garnishees, and they borrowed the extra billion dollars from Hugo Chavez, but they paid off the $9 billion by appropriating that money.

Now they don't dispute that's what happened. As I said, that's what they described here. What they then try to say is: Well, there was a loan, it was actually a loan to the government of that $8 billion that was taken out of the central bank's reserves. Well, if it's a loan, your Honor, it's still Argentina's money if it's a loan to the government.

So one way or the other the Argentina – all the money that the central bank held in excess of its monetary obligations became the property of the government of Argentina, and we attached that validly on December 30th, and your Honor we attached it then –

THE COURT: Now look, I want to be – you're on the decree, it's page one, that paragraph beginning consequently.

MR. RIVKIN: Right, and it says then –

THE COURT: Just a minute.

MR. RIVKIN: That's the whereas clause, right.

Then Article I of the decree has in its paragraphs first says that the reserves of the bank shall be what it needs to support the monetary base, and it defines that – it says

that in Article IV and it defines that in Article VI. And then the last paragraph of Article I, which is on the top of page three, appropriates the unrestricted reserves, the reserves they don't need for the monetary base, to pay obligations undertaken with international monetary authorities. And those obligations are only the government's obligations.

Mr. Neuhaus has admitted that the debt that was paid off was Argentina's debt against the IMF. That's also in their papers. They say in their brief: These borrowings are ultimately the Republic's vis-a-vis the IMF. So they admit the purpose of the decree was to make it possible for them to pay the debt to IMF from the reserves.

And in light of these admissions, your Honor, the argument that the funds were somehow held by the central bank for its own account defies logic. And as I said –

THE COURT: Wait a minute. The new Article V says reserves in excess of the percentage established in Article IV, that is to cover the monetary base, reserves in excess of the percentage established in Article IV shall be known as unrestricted reserves. And then in Article VI it says the assets that constitute the reserves mentioned in the preceding articles are not subject to attachment. What is meant by that?

MR. RIVKIN: It's a rather self-serving statement by the government that it doesn't want the unrestricted reserves, which is defined in Article V, to be attached. But the rest of

Article VI makes clear that can't be, they can't simply declare it not subject to attachment.

THE COURT: When it says the assets that constitute the reserves mentioned in the preceding article, I guess it's referring to the unrestricted reserves.

MR. RIVKIN: Well, it probably refers to both reserves because it talks about the preceding articles. It probably talks about both the restricted reserves described in Article IV and the unrestricted reserves described in Article V. But you look to US law, not Argentinian law about whether it is subject to attachment.

THE COURT: Then the concluding part of that article is what you are mainly referring to, and it says: As long as the monetary effect is neutral, the unrestricted reserves may be used for payment of obligations undertaken with international monetary authorities.

What's meant by as long as the monetary effect is neutral?

MR. RIVKIN: Means they have to protect the monetary – they have to protect the value of the currency with the restricted reserves, the amount that is necessary with the restricted reserves, but the other reserves that they don't need to support the pesos.

THE COURT: Is that what is meant by monetary effect, do you think?

MR. RIVKIN: Yes, your Honor. They clearly divided reserves into two pieces; one was for the ordinary central banking function of protecting the monetary base, and the other was to pay off the government's debts. And that's not an ordinary central bank function. Surely they may sometimes act as a paying agent, but if they are acting as a paying agent it's the government's money they are paying. And the government here must take this unrestricted portion of the reserves and then they issued payment instructions to the central bank, just like any other debtor, and said pay off this creditor. This creditor happens to be a very big one, the IMF and they paid them $9 billion.

THE COURT: Billion.

MR. RIVKIN: Billion. They could have, by the same stroke of the pen, said pay off the other creditors, like those of us that are at the table, but they chose not to do that.

THE COURT: And there was a second decree; right?

MR. RIVKIN: Yes, there was a second decree the same day saying effectively the same thing.

Sorry, the second decree said pay the IMF, that's Tab 2 behind –

THE COURT: Decree 16\01\2005?

MR. RIVKIN: Yes.

THE COURT: What does that say?

MR. RIVKIN: It says, if you look at the third

paragraph from the end – actually if you look at the fourth paragraph from the end, again it says what we were talking about a minute ago, use of part of the reserves to address commitments to international monetary authorities, those are only the government's obligations, doesn't affect the maintenance of an appropriate level of liquidity. Then it says given these circumstances, it is necessary and appropriate to order the implementation of the mechanisms for payment of the debt to IMF. So those are the payment instructions from the government to the central bank.

And then the next to last paragraph says the minister of economy is instructed to take the pertinent steps. So that's the government making the payment through the central bank, again, just like any other deadbeat debtor, as I described.

And if you look at the first paragraph under the whereas at the top of this second decree, again it simply – it provides that, in accordance with the first decree, the reserves of the central bank that are in excess of the monetary base, in other words the unrestricted reserves, may be used to pay obligations, the government's obligations, not the bank's, undertaken with international monetary authorities.

So they divided the pie in half, they appropriated the half or the two-thirds, one-third, but they took the piece of the pie that they wanted to pay off the IMF because they made a

decision that's what they wanted to do by the year end and they used this money to do it. And payment of – so there's no question that this money that was set up at the central bank as unrestricted reserves, became, if it wasn't already, the property of Argentina.

And it's also clear, your Honor, that payment of sovereign debt is a textbook example of commercial activity.

THE COURT: Why is that a textbook example?

MR. RIVKIN: Because the Supreme Court said so in the Weltover case.

THE COURT: Really?

MR. RIVKIN: Yes, it was Argentina v Weltover. And that's why we're here, your Honor.

THE COURT: It says that if it was doing this that private people would do –

MR. RIVKIN: It says it's the same character, your Honor, is the word that it used. That's the operative word. And what they are doing, they borrow and they pay back. That's what a private person does and that's what a government can do.

But that payment of debt is commercial activity. You have already ruled that effectively by granting our judgment because the commercial – under the commercial activity exception as well.

THE COURT: What do you mean I ruled that? I haven't ruled any such thing.

MR. RIVKIN: There's no difference, your Honor, between the debt which they, Argentina, owed to us and the debt which Argentina owed to the IMF. In both case they borrowed money, which is the same that a private person can do, and they have to repay the money. That is of the same character and that's the test under the Weltover case, and the legislative history makes that clear.

And if Congress -- They argue that somehow payment to an international monetary authority is different, but Section 1611 of the FSIA makes that clear, because if Congress intended to immunize payments to multilaterals like the IMF, they would have done so in that section, because that section immunizes payments from multilaterals to the United States but doesn't immunize payments in the other direction. Clearly Congress also viewed payment by the government to the IMF as being an ordinary commercial activity.

So your Honor, for these reasons we think we have properly attached funds which are the government of Argentina's. We don't think any basis for immunity applies to the funds we have attached, and we would ask you to confirm the attachment in place.

There is one additional argument, your Honor, which is that we believe that Argentina has waived any immunity over those funds, and Mr. Cohen can address that to your Honor.

But then finally let me say that we pointed out in our

brief that, should you feel that there are – that you can't confirm it now, perhaps because there are some factual issues about some of the statements made by Argentina, then we should be entitled to discovery to learn more about the effect of the decree, the central bank functions, what Argentina plans to do with additional freely available reserves as they come up, the purposes of the funds.

There are a lot of issues, your Honor. They have made certain factual statements in their declarations with which we completely disagree, and there is no urgency to lift this at this point in time because of the stipulation which is entered into which allows them to continue what they ordinarily need to do. If you would like to later, we can talk about the specific discovery issues, but we don't think discovery is needed in order to confirm the attachments at this time.

THE COURT: Look, the $105 million in the Federal Reserve Bank here deposited by the central bank was not actually used to pay the IMF; right?

MR. RIVKIN: That is what they say. That is their assertion.

THE COURT: I am going to assume that. I mean it's there and –

MR. RIVKIN: But we don't know what else might have been there on December 30th. But assume that is true for now, that's right.

THE COURT: Let's assume it.

MR. RIVKIN: That's fine.

THE COURT: Now I would think that your argument, if that assumption is correct, your argument would have to be based on the first decree, because the second decree would not really particularly come into play, but I assume you're really relying on the first decree. And you certainly emphasize that this afternoon; right?

MR. RIVKIN: Yes, your Honor. I think the framework, the way I would put it is that the first decree made clear that the unrestricted reserves, the reserves in excess of the monetary amount, were the government's.

What the second decree showed, I'm not relying on it for that purpose, but what the second decree showed is that first decree is true, because they were able in the second decree to say: Now that money is ours and you pay it. And the fact that they didn't need all of it doesn't mean the rest of the money isn't theirs, it only means that they only instructed the central bank to pay that amount of the unrestricted reserves, but the rest of it has still been defined, what is left behind, including this $105 million, is still in the unrestricted reserves pool, which is Argentina's, and they –

THE COURT: How do we know that the 105 million is in the unrestricted part of the reserves?

MR. RIVKIN: Well, the decree didn't discriminate it,

it simply created different accounts, but there's no – there was no label attached to one dollar or another. In any event, money is fungible, your Honor, and in fact they are not arguing – they have not argued that this $100 million is necessary for the monetary function of the government.

THE COURT: Well, I'm a little puzzled how that would work, because there's a lot of bond indebtedness, and I think there are billions of dollars' worth of bonds represented by the lawsuit. The lawsuit is before me; isn't that right?

MR. RIVKIN: That's right. Our judgment alone is about $750 million, your Honor.

THE COURT: Let's take a hypothetical case. Let's suppose the amount of the – what do they call it, the unrestricted reserves?

MR. RIVKIN: Yes, your Honor.

THE COURT: Let's suppose that it is $15 billion, and let's suppose that – let's put the IMF out of the picture, and let's suppose that – my figures may be totally cockeyed, I'm talking hypothetically.

MR. RIVKIN: I understand.

THE COURT: Let's suppose there is private bond indebtedness out there that hasn't been taken care of by the settlement of say $20 billion.

MR. RIVKIN: Yes, your Honor.

THE COURT: Unrestricted 15 billion, bond indebtedness

20 billion, and let's suppose that all those – there's judgments entered totaling 20 billion.

Now the judgment creditors start in, and my hypothetical has to assume that they can go around and attach or execute anywhere they can find the money; Bank of England, French banks, Italian banks.

Now this may be unrealistic, but I still have a point that I would like to ask you about. They go to somebody with a judgment for a billion dollars, comes to the Federal Reserve Bank in New York and said well, there's this decree, and these unrestricted funds belong to the Republic and we have a judgment against the Republic and we are serving a writ of execution for a billion dollars. And the Federal Reserve Bank says we don't know whether it's restricted or unrestricted, we haven't been told.

And so the judgment creditor says well, look, we know that the amount of the unrestricted is 15 billion, and so we're only taking one billion here, so freeze it. And then somebody else goes to the Bank of England, and let's suppose under the law they could execute, and they have got a judgment for 3 billion. They go to the bank of England, and the Bank of England they say we're attaching unrestricted reserves, and the Bank of England says we don't know whether they're restricted or unrestricted. And the judgment creditor says well – and the Bank of England says what's going on all over the world.

And the guy says I don't know, we haven't been told, they're an ex-parte, people can get ex-parte attachments, there isn't a schedule that is posted every day. So they say well, it's only 3 billion and there's 15 billion of unrestricted so we have a right to attach, and let's suppose some English judge agrees, so attachment of a total of 4 billion.

But it seems to me that without some designation, this could be – and I don't think my hypothet is too wild – it seems to me that if we can simply go in, if some judgment creditor could go in to seize assets and those assets are not clearly designated as property of the Republic, what's the basis for seizing the assets?

And if we say we don't care about that, then it seems to me potentially absolute chaos.

MR. RIVKIN: Your Honor, let me answer that question in a number of different ways. First of all, while the central bank and the government have each made various untested declarations to you in this particular proceeding, in none of those declarations did Argentina argue that the money held at the Fed is part of the so-called restricted reserves which are necessary in order to protect the value of the currency.

THE COURT: I don't read that in the papers as admitting one thing or the other. What's the central bank say?

MR. RIVKIN: They don't say that, your Honor, and I think –

THE COURT: Maybe I'm making up a problem that doesn't exist. If so, I'm very sorry.

MR. RIVKIN: I believe, your Honor, it's not a problem that exists. To make it clear, the restricted reserves are the amount they need to match the amount of pesos in circulation. That is the monetary function of the central bank. That's an ordinary central bank function. That's a calculable amount. You can calculate that amount.

Everything in excess of the value of those pesos in circulation was defined by the decree we were looking at as the unrestricted reserves. And nowhere in Argentina's or the central bank's papers to you did they argue that this $100 million of the Fed is necessary to be part of the unrestricted reserves. So that's answer number one.

THE COURT: It may be so, but what they're arguing is that the reserves never became the property of the Republic. And it seems to me, although my hypothet may be a little far afield of what people have talked about, in my own mind – and maybe it's misguided, but in my own mind it seems to me to – it causes me some considerable caution in saying that there is something called the unrestricted reserves which has suddenly changed hands.

MR. RIVKIN: Your Honor, let me –

THE COURT: As far as property is concerned.

MR. RIVKIN: I understand. Let me make two points in

response which I think should answer your concern.
In addition to the fact that this is not a – this was not part of their declaration, so I think they didn't say it, but the fact is, look at the chronology of the events. On December 15 the government said: Those unrestricted reserves, everything in excess of the amount of pesos in circulation, those unrestricted reserves are ours. That was true on December 15. That was true at the central bank where –
THE COURT: The date of the first one?
MR. RIVKIN: Yes. That was true at central bank's funds wherever they were held anywhere in the world.
On December 30 we received an – we obtained an order of attachment and served it on the Fed. On December 30 – there's no question that if they had chosen to pay the IMF on December 29, they could have paid the IMF out of this $105 million that was at the Fed. They could have. They hadn't.
On December 30 we put an order of attachment on.
THE COURT: When did they pay the IMF?
MR. RIVKIN: They paid the IMF on January 3rd out of other funds. That's why I know they made a big point about how we didn't wait to see you. You weren't around that week, we knew they would make the payment any day. We had to serve the order of attachment before they made the payment. Once we served the order of attachment, those funds became ours.
The other way you could be become comfortable, if

those arguments don't make you feel comfortable, is that the amount of the central bank's reserves, total reserves, restricted and unrestricted, is a matter that could be subject to discovery along with the amount that is restricted, because the value of pesos in circulation are certainly clear. And so it would be very easy to make you comfortable that by continuing the attachment and then agreeing for us to execute on the attachment, it's not going to dent the amount of the restricted reserves.

THE COURT: Look, aside from some supertechnical question of property law, which I think frankly a person could argue about either way, your argument is certainly a perfectly good argument. If somebody becomes entitled to direct the usage of money, that's a pretty good indication of property right. It's not a bad argument at all.

But it's not a bad argument for the central bank and the Republic to say that merely because of those decrees the property situation, the title situation didn't change, it's simply the Republic has always had the right to issue certain directions to the central bank and so nothing changed.

In other words, a technical property argument it seems to me both sides have things that you can say. But the one thing that it seems to me, getting past that, is from a practical standpoint you have got central bank functions, and the central bank functions, which are actually pretty well

listed in an affidavit from the Federal Reserve Bank just saying what are typical central bank functions, and the bank's own papers, those functions, with respect to the money on deposit at the Federal Reserve, were going on, as far as I know, prior to the time of the first decree, after the first decree, after the payment to the IMF, and the whole exercise of working out this stipulation was undertaken because of the necessity to keep the central bank functions going.

So to me that is pretty obvious, plain-in-the-face practical fact, and I think that that is of considerable importance, despite the fact that two reasonable people could come to completely different conclusions if you're just looking to some question of property or title. And I find it very difficult to get around the fact that the central bank functions was going on. And what do you say about that?

MR. RIVKIN: Your Honor, I have a few responses to that. First of all, if this was an ordinary central bank function, then they wouldn't have needed the first decree. Why did they need to appropriate that amount of unrestricted reserves and say: Central Bank, you may have been holding that money and you may have thought it was yours, but now it's ours and we are going to instruct you to pay the IMF with that amount.

THE COURT: It may not really mean it is ours, in a sense, it may mean - well, it means what it means. It means

that, to me, one very good interpretation is that they're saying that, among the other central bank functions that can be performed, is payment to international lending agencies, but it doesn't say that the whole central bank function is to be set aside.

MR. RIVKIN: No, we're not saying the central bank function should be set aside, we're saying that they needed that first decree because the money and the function wasn't there otherwise. And your Honor, I think Argentina would be very hard pressed to say that nothing changed by the decree. Because if they were to say that, they would have to admit that they had the right to make payments to creditors, whether to the IMF or anybody else, out of the central bank money before the decree. And if they were to tell you that today, your Honor, that would be in direct contradiction to what they told you last February and March when we raised an issue about the central bank clause.

THE COURT: I agree with you, but the question is: What changed and how much of a change was there? That's the issue before me.

MR. RIVKIN: Clearly they did not believe – if they believed that the money that the central bank was holding in the United States before the decree was Argentina's, then they would have been in violation of your order not to move any of Argentina's funds out of the country by moving $2 billion out

of the country just since last spring. Those are admitted facts by Argentina. So if Argentina believed that the money held by the central bank was its own, and therefore –

THE COURT: That doesn't help.

MR. RIVKIN: It goes to the –

THE COURT: They don't contend the money has always belonged to the Republic of Argentina, they have done exactly the opposite.

MR. RIVKIN: That's right, it was changed by the decree. So what the decree did was appropriate that central bank money to Argentina, and that's why we had a right to attach it.

THE COURT: Listen, I think I have got your argument. Anybody else at your table want to add anything? Then we'll go to the defense.

MR. RIVKIN: Thank you, your Honor.

THE COURT: Thank you.

MR. COHEN: Your Honor, Robert Cohen for NML.

I would like to take a minute to show your Honor why I think there is in fact a waiver, a specific waiver in the governing documents as to the very assets we're talking about here. And I should start with the Foreign Sovereignty Immunities Act.

In Section 1611 of the Foreign Sovereign Immunities Act it's provided that the property of a central bank or

monetary authority held for its own account is immune unless such bank or authority or its parent foreign government has explicitly waived its immunity.

Now I would like to take your Honor to the place in the documents where that immunity is waived.

THE COURT: Where are you reading from?

MR. COHEN: I was reading from Section 1611 of the Foreign Sovereign Immunities Act at Section (b)(1).

THE COURT: I have it. And I just somehow my eye didn't get to the right place.

MR. COHEN: It's Section (b)(1), your Honor.

THE COURT: Okay. And just go over that again.

MR. COHEN: It says that notwithstanding the limitations in Section 1610 which immunizes certain assets, it says in (b)(1) that the central bank assets in effect –

THE COURT: What's the exact language?

MR. COHEN: The property – I'm reading from 1611(b)(1), the property is that of a foreign central bank.

THE COURT: Well, the property of a foreign state shall be immune from attachment and from execution if; am I right?

MR. COHEN: That's correct. If the property is of a foreign central bank or monetary authority held for its own account, unless such bank or authority or its parent foreign government has explicitly waived its immunity from attachment

or from execution. So that says if in fact the parent government has waived it, it would be available for attachment and execution.

And your Honor, in my declaration in support of the ex-parte motion, Exhibit 19 is the declaration of Paul Singer from my client, and attached to that as Exhibit A is the fiscal agency agreement that governs our bonds. So that's Exhibit 19A, your Honor, and it's captioned fiscal agency agreement.

THE COURT: Okay.

MR. COHEN: And if you turn to the back, your Honor, there's a page in manuscript 52, it's also A18 in typescript.

THE COURT: Okay.

MR. COHEN: And the second paragraph begins: To the extent that the Republic or any of its revenues, assets or property shall be entitled, then talks about immunity, if you skip down to the underlined phrase down there, your Honor, it says: Immunity. The Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issuance in any process in any proceeding or related judgment. And here's the key phrase, your Honor, provided that such waiver, that's the waiver of the Republic's assets, immunity of the Republic's

assets, shall not be effective, one, with respect to the assets, and those are the waived assets, the government's assets, which constitute freely available reserves pursuant to Article VI of the convertibility law.

Now we have talked about freely available reserves, your Honor. That phrase, as used in this document, relates to the reserves necessary to support the monetary base. And what this is saying is there is no waiver with respect to reserves that are supporting the monetary base, but there is a waiver with respect to the other reserves that are reflected on the balance sheet and the accounting statement of Banco Central. That's the central bank.

What this says, your Honor, is that they have waived immunity with respect to the assets of the central bank other than those necessary to support the monetary base. And Mr. Rivkin has showed you that by decree they have freed up assets not necessary for use in the monetary base. So we believe there is a waiver that is effective and that our attachments reach those assets.

THE COURT: Well, go back to the let's look at that long paragraph just a little more. Can you paraphrase the very beginning part? I'll have to confess to you I haven't focused so much on this waiver point. I apologize for that, but that's the fact of life, so help me out.

MR. COHEN: I'll try, and I note very similar language

appears in the terms and conditions of the bonds.

THE COURT: Why don't you paraphrase that first part of that long paragraph.

MR. COHEN: What it says is that Argentina, to the extent it is entitled to immunities in any jurisdiction, in which a specified court, and I don't think there's any dispute that this Court is a specified Court, over any of its assets the extent that –

THE COURT: Doesn't talk about immunity, it talks about –

MR. COHEN: To the extent assets are entitled to, then it has where it might be entitled to something.

THE COURT: Well, it talks about in any jurisdiction where any specified court is located in which any related proceeding may at any time be brought against it, or in any jurisdiction in which any specified court or other court is located in which any suit, action or proceeding may at any time be brought for the purpose of enforcing or executing any related judgment.

I see what you mean. You're entitled to immunity from suit in the jurisdiction of such court from attachment prior to judgment, from attachment in aid or execution of judgment, from execution of a judgment or any other legal or judicial process or remedy.

And to the extent that there would be normally

immunity, the Republic has irrevocably agreed and waived such immunity to the fullest extent permitted by the law. So what you're saying is there is specific reference here to possible immunity from attachment from execution, and you're saying that what this instrument does is to waive the sovereign immunity, waive immunity except what's provided in the exceptions down here.

MR. COHEN: That's exactly right. Shall not be effective with respect to reserves that affect the monetary base, other reserves are specifically waived. We think that's the intended and only reading of that provision.

THE COURT: Let's go down with respect to the assets which constitute freely available reserves pursuant to Article VI of the convertibility law. Is that an Argentine law?

MR. COHEN: That's an Argentine law, your Honor, and there's a declaration attached to Mr. Hranitzky's declaration from the Argentine lawyer who was involved in the preparation of the convertibility law. And that declaration confirms that the term freely available reserves as used in this document was intended to mean reserves supporting the monetary base.

Coincidentally, your Honor, that same phrase is used in the later law to mean just the reverse. In the decree in 2005 they used the phrase freely available reserves to mean not the reserves needed to support the monetary base but the reserves in excess. We don't think that was accidental, your

Honor, we think that was intended to confuse the issue and try to suggest that the now-called freely available reserves, the reserves not needed to support the monetary base were somehow covered by this limitation. And the declaration of Mr. Liendo makes that very clear that the phrase freely available reserves as used in this document meant the reserves supporting the monetary base.

As we have heard from Mr. Rivkin, it was –

THE COURT: Well, it says -- I mean this is a translation, of course, I guess all the originals of all these are in Spanish, but the language in the first decree is unrestricted reserves, so it isn't exactly -- at least the English isn't exactly what is here.

MR. COHEN: Right.

THE COURT: Now if there has been a waiver, what's the effect of all that?

MR. COHEN: Your Honor, it's our view that the waiver entitles judgment creditors and those who are entitled to attachment to reach those assets, if there's a specific waiver in the jurisdiction over which the waiver applies. And this waiver applies to assets in New York. NML has a judgment, we have a motion pending, we hope we'll have judgment soon, but we think that we're entitled to prejudgment attachment, and the waiver specifically covers attachments prior to judgment. So we think we're entitled to attach assets in New York that fit

the characteristic of being held at the central bank but not supporting the monetary base, and we know from the decree that they have freed up $15 billion not needed to support –

THE COURT: Whatever the amount is.

MR. COHEN: Correct.

MR. RIVKIN: Your Honor –

THE COURT: What about the – what is this, when it says assets, whose assets?

MR. COHEN: We think that means the assets of the Republic, your Honor, and we think that what this also confirms is that they intended the assets held by the central bank to be deemed Argentina's assets, otherwise the phrase "the assets" wouldn't have any meaning.

Argentina is waiving immunity to its assets, it talks about the assets at the central bank, and it waives as to some of them. We think we have attached that portion that they have waived. So while we have heard a lot of argument about the distinction about whose assets are they, Banco Central's independently or do they belong to Argentina, we think the fair reading of this waiver is that Argentina considered the central bank assets its to waive, and that is why we think they moved those assets out of New York because they knew that this argument was available.

THE COURT: Okay. Anybody else on the plaintiff's side?

Who wants to speak on defense?

MR. BLACKMAN: Your Honor, I was not planning on taking the floor because the attachment as to the Republic as opposed to Central Bank is really gone, but I am going to take it because what Mr. Cohen just said is so radically wrong as to almost be beyond belief. And he's talking –

THE COURT: Mr. Cohen, you're beyond belief.

MR. BLACKMAN: And the reason I say that, your Honor, and I try not to indulge in hyperbole, is this is the Republic's waiver and the Republic's bond. It's not a waiver of the central bank's immunity, it's a waiver of the –

THE COURT: Mr. Cohen recognized that issue. What he said is this waiver would be meaningless if it did not apply to funds in the central bank, and obviously the Republic and the central bank are not completely divorced entities.

MR. BLACKMAN: Yes, your Honor, but let me make a couple of points. Mr. Cohen read from the general form of the bond, if I could direct your attention to, I believe it's –

THE COURT: He's reading from one of these fiscal agency agreements.

MR. BLACKMAN: But if you look at the terms of the bond that his client bought, which I think is Exhibit 17 to his declaration, it says something that's very important. What it says is, in that language that provided that clause that he talked about, it makes much clearer what the intent is, and the

intent is –

THE COURT: Where are you reading? Is that an exhibit before me?

MR. BLACKMAN: Yes, page A13, Exhibit 17– I'm sorry, page A13 of Exhibit 17 of Mr. Cohen's declaration.

THE COURT: Exhibit 17. Where in the Exhibit 17?

MR. BLACKMAN: In the last paragraph, which is comes from the form language that Mr. Cohen was reading to you, it says and the Republic, to the extent the Republic is entitled to immunity, it waives its immunity to the fullest extent permitted by law, then about five lines up from the bottom, provided that attachment prior to judgment or attachment in aid of execution shall not be ordered by the Republic's courts with respect to assets which constitute freely available reserves.

Now why is that there? The reason it's there is explained in Mr. Molina's declaration, which I urge your Honor to read, and Mr. Molina's declaration – and he is involved with Mr. Liendo in preparing these bond terms in 1994, he says that the reason we have this here, and discussed in paragraphs seven and eight, Mr. Liendo and others insisted on putting this in because they wanted to eliminate any possibility that an Argentine court may view the Republic's waiver as somehow implicating BCRA's reserves. And the purpose of this clause is to say that any such inference would be erroneous. The exception from the Republic's waiver therefore refers

specifically to attachment or execution by the Republic's courts.

But they didn't want to have Argentine courts think that a waiver of the Republic's immunity somehow affected the reserves of the central bank. This provision has no application whatever in the United States or under the FSIA where it is clear under Section 1611(b)(1) that a waiver of central bank immunity, as opposed to the Republic's immunity, which was covered by Section 1610(a), the waiver of the central bank's immunity must be explicit either by the central bank itself or explicitly by the Republic on behalf of the central bank.

Well, there's no piece of paper in which the Republic says I hereby waive the central bank's immunity. There is certainly no piece of paper by the central bank that says we waive our immunity. And this exception to the Republic's waiver is purely for Argentine legal, and as the declaration says, to some extent political purposes to make it clear that when Argentina was waiving its immunity it was not an Argentine court's intending to waive their immunity.

It's an issue that doesn't arise in the US because under the FSIA no one but Mr. Cohen today would ever suggest that a waiver by the Republic was a specific waiver of the immunity of the central bank. And if he thought that was true, your Honor, he would have been in this Court years ago. This

clause is in his box. Even these folks, who are constantly, quote, discovering new things and running in, certainly know the terms of their bonds.

Under his theory, as he enunciated to you, which has nothing whatever to do with the decree of December 15, he says all the reserves of the central bank were at all times, or at least the freely available reserves, were somehow available for execution.

THE COURT: No, no, no, I don't agree with that. I think that what we call the first decree is quite important to Mr. Cohen's argument, because it expressly states that there are reserves that are not necessary to back the currency. Right, Mr. Cohen?

MR. COHEN: Yes, your Honor.

THE COURT: So let's not waste time. He is relying on that decree and saying that's a new development.

MR. BLACKMAN: He is, but his Argentine law argument, because the whole point of the discussion is about this clause that refers only to the Argentine courts, up until the December 15 decree, all reserves, as set forth in Mr. Ribaso's declaration, were freely available. So it can't be the case –

THE COURT: Well, apparently we have got somewhat of a problem with interpretation about what is meant by freely available. I thought that prior to the first decree all the assets in the central bank belonging to Argentina had to be

preserved there for the currency.
MR. BLACKMAN: That's right.
THE COURT: So --
MR. BLACKMAN: Even if they were higher than the monetary base.
THE COURT: They had to be preserved for the currency, and maybe that's a little confusing in terms of this wording freely available, but I think that that piece of confusion we can get by and we understand that all those reserves were preserved for the currency. And that was indeed changed, whether it's a big change or little change, that was some change by that first decree.
MR. BLACKMAN: I don't deny there was that change, but I don't think that change affects his argument, which is when these bonds were issued years and years and years ago, somehow this was a waiver of the central bank's immunity. It wasn't.
THE COURT: The bulk of the central bank's assets are where, in Argentina or in foreign banks?
MR. BLACKMAN: I'll turn the floor over to Mr. Neuhaus, but my understanding is the bulk of the central bank's foreign currency reserves by definition have to be somewhere else, are all over the world; a large number of them at the BIS, as the Court heard last February, and other places as well.
Before I turn the floor over to Mr. Neuhaus –

THE COURT: Then why is it so significant to do what you talk about as occurring in the bond, and that is make it clear that the reserves in Argentina are not involved in any waiver? Why was that so important if all the reserves were in foreign countries?

MR. BLACKMAN: Because there are some reserves in Argentina, and the concern was that Argentina was waiving its immunity and wanted to make it clear to whatever Argentine read this this was not going to affect the inviolability in Argentina of the reserves.

THE COURT: Where does it say in Argentina?

MR. BLACKMAN: That's what this clause that I read on page A13 of Exhibit 17 says. It says attachment shall not be ordered by the Republic's courts. It only deals with as actually enacted as opposed to in the form.

THE COURT: Beginning with the word provided that?

MR. BLACKMAN: Yeah, three lines down, as ordered in the Republic's courts.

THE COURT: What comes before provided?

MR. BLACKMAN: That is the same type of language, that the Republic waiving its immunity to the fullest extent permitted by law.

THE COURT: Just a minute, please. That's comparable to the provided for clause in the fiscal agreement.

MR. BLACKMAN: With the exception of this language

ordered by the Republic's courts.

THE COURT: But you have got a waiver and then you have got a qualification of the waiver.

MR. BLACKMAN: Correct.

THE COURT: And the qualification to the waiver, let me read that, in the bond.

Well, it's odd, you certainly have a much more limited qualification there, you can say that because the bond does say there will be no attachment ordered by a Republic Court, and the limitation of the Republic Court is not in the fiscal agency agreement. So what controls?

MR. BLACKMAN: I think clearly the terms of the bond control over the form of the bond in the fiscal agency agreement. But the point really is, your Honor, is this is a red herring.

THE COURT: Please, I don't think it's a red herring. I think that you may be right and Mr. Cohen may be right. It seems to me that the ultimate question is how you interpret, how you apply 1611.

MR. BLACKMAN: That's right.

THE COURT: Which requires an expressed waiver by the bank or for the bank.

MR. BLACKMAN: Correct. And we don't believe this does that.

And I'll add one more 1611 point then I'll sit down,

which is that it is absolutely clear, held by Judge Sweet and every other Court that considered it, that 1611(b)(1) only applies, as its language indicates, to post-judgement execution. A foreign central bank even explicitly can't waive its immunity to prejudgment attachment. So Mr. Cohen loses just on that point; not, admittedly, Mr. Rivkin, whose client does have a judgment.

The case law under 1611, the Court is exactly right, says that you have to have an explicit waiver by the central bank. And I don't think that the Court could find that the language that we are reading is an explicit waiver of the central bank's immunity. If it is slightly confusing, whatever it is, it's not an explicit waiver.

And I turn the floor over.

THE COURT: Let me ask you this: Is there anything, or is this just my own dream, is there anything to the issue about how to identify what has been freed up and what hasn't?

I don't think anybody brought it up, and I brought it up because it just occurred to me sitting here, but maybe there's nothing to that issue. But if we're talking about specific legal rules that apply to these assets that are now called unrestricted reserves. If you go to the Federal Reserve Bank, you don't find such a designation, whether it's restricted or unrestricted. And I guess nobody raised that, but it does occur to me that maybe it's at least a little

problem.

MR. BLACKMAN: I think it's a great problem, and I just say briefly that what is clear on this record is that there was no intention to use the money at the Fed for this payment for the IMF, nor was it used. And that money, as the Court noted, has been used, the amount has obviously ebbed and flowed over the years for central banking activities, buying and selling currencies, receiving reserve deposits of Argentine banks. And the Fed has no way of knowing, because under this authorizing legislation, the central bank was unable to use certain portion of its reserves to pay the government debt to the IMF, which is itself a classic central banking function because the central bank is the banker to the state.

The Fed has no way of knowing that. All it knows is that this account is, as the Fed explained in its declaration, reserves of the central bank. The Fed treats them as reserves of the central bank. They have been used consistently for central banking purposes. And under Section 1611(b)(1), that is what property of a foreign central bank held for its own account means, means assets used for central banking. These assets that have been attached, which is what is in New York, the only thing that can be attached have been used for central banking, if unfrozen will continue to be used for central banking.

THE COURT: Let me ask you, I imagine that everybody

here has some experience in this kind of litigation, have you ever seen any kind of situation where there was an explicit waiver with regard to the assets lodged in a central bank? Have you ever heard of such an instance?

MR. BLACKMAN: Mr. Neuhaus read the cases more recently than I have. In the cases in the Southern District, most of them find there is not a waiver and most of them protect, if not all.

THE COURT: Have you have had experience in transactions? The thing is that there is a requirement of an explicit waiver, but I suppose if some bond agreement were negotiated and there was a desire to provide some security or a remedy, I suppose what could be done, in addition to waiving the sovereign immunity and allowing suit, I suppose it could be that there could be an explicit waiver with regard to assets in a central bank account.

And it seems to me that if that is done, it should be quite clear the type of assets covered should be defined, and it could be that some bond, some people interested in buying bonds might demand that and the government might grant it. But it seems to me that it's a little difficult to see how there is an explicit waiver, and I must say that I think that it contributes to the problem that there's no definition of that kind of asset at the bank.

Let's hear from Mr. Neuhaus.

MR. NEUHAUS: On that last point, your Honor, I believe the cases do show – have examples of expressed central bank waivers of immunity. And I'm afraid I'm working from memory here, and I hadn't put this in mind, but I believe the Weltover case, a Supreme Court case, involved a central bank that had given expressed waiver of immunity sometimes in other situations, and it may be true for other cases as well. So I think you can find examples in the case law of central bank waivers of immunity.

THE COURT: You can or cannot?

MR. NEUHAUS: You absolutely can. If, for example, the central bank guarantees the bonds, and as a condition of this guarantee the central bank may waive its immunity. So it does exist in the law. I don't – I'm not certain of Weltover, but I think so, as I recall the case.

THE COURT: What do you have to add?

MR. NEUHAUS: I think the two points that I raised in discussion with Mr. Rivkin are of paramount importance. One is the difficulty of attaching, administering the system that Mr. Rivkin envisions with his view of how to determine what is attachable; and the other is the central bank functions, which are of paramount importance of protecting central bank functions, which is what Section 1611 is all about.

Briefly, because you already talked about this on the first point, it is an absolutely a real life concern how a

garnishee like the Fed could possibly know when a garnishment comes in, a restraining notice comes in, what is being – how much of the reserves the central bank has around the world. They know what they have in their account, but they have to know how much they have around the world at that very moment, then they have to know how big is the monetary base. That monetary base is all the pesos in circulation in Argentina plus amounts in certain special accounts. That's the definition under the law. So you have to have all these little pieces. There's no way the Fed could know about that, no way one bank could know about that.

Then you do this calculation. In Mr. Rivkin's world the numerator is the amount used for the monetary base, the denominator is the entire reserves, and you get a percentage. And he says you take that percentage and look at what's in the Fed, $105 million, and say okay, this money is freely convertible. That's not how garnishment works. That's not how attachment works in New York law.

In New York law you can only attach what is here. And as your Honor knows, the separate entity doctrine, you only attach what is in that very branch. The branches don't even have to call around to the branch in the next borough to find out whether there's been a -- whether a check is coming in or anything like that.

And certainly if you serve a restraining notice on the

branch in New York, you won't restrain that bank's other branch somewhere else. And it's all because branches aren't supposed to have to go and find out all that information in order to administer a restraining notice.

If that's New York law on attachments, and it is, there's no way this can be consistent with New York law. This is an incredibly complicated system. Plus it's a very intrusive system and a system that would require the Fed or this Court or Mr. Rivkin to demand from the Central Bank of Argentina or the central bank of any other country this very detailed information. And it's exactly that purpose that Congress had in mind when it enacted the central bank exemption, the purpose being the disruption of the foreign relations of attaching central bank reserves.

If I could move then to the question of what is the exemption meaning, the central bank exemption means – the central bank exemption has been universally interpreted by every court to mean it is the property at issue held for its own account, means is the property at issue being used for central bank functions.

And as the Fed tells you in their declaration, one classic central bank function is representing the sovereign in dealings with other central banks and international monetary organizations; it's also receipt of deposits from international organizations. Those are central bank functions.

And so this money that they say was suddenly somehow treated differently and made available to be paid to the IMF, according to their theory, that use of that money is a classic central banking function.

THE COURT: When you say classic central bank, versus commercial?

MR. NEUHAUS: Versus another function.

THE COURT: Does the commercial exception, if you want to call it that, is that relevant to 1611? I think you said it's not.

MR. NEUHAUS: It's not.

THE COURT: Maybe it is not in your brief.

MR. NEUHAUS: It is not. And there are cases that say this, all of the presumption in a sense is that any assets that are subject to that exception are subject to attachment and therefore must be used for commercial purposes.

THE COURT: But if you consider the property as property belonging to the Republic, then you have to get into the question of whether repaying or paying the debt to the IMF is commercial activity; don't you have to do that?

MR. NEUHAUS: If you are ignoring entirely the central bank and treating it as a property of the Republic, but I think that you have to accept that the central bank exception applies sort of prima facie to anything that the central bank has.

Let me go back a step, because I think this whole

property question is not at the center of the inquiry. At the center of the inquiry is you have funds that are in the central bank that refers you to the central bank exception, then you ask: Are those funds being used for central bank purposes or for some other purpose?

One other purpose that the cases prescribe is one central bank, I think it was Peru, put $2 million in a big bank solely, the word solely is very important, for the purpose of securing borrowing by commercial banks. That, the court ruled, was not a central banking function, that was just posting money to allow another – to allow a bank to borrow money which was a commercial transaction. And so that is not viewed as a central banking function.

Another thing that has been viewed as not a central banking function is when the bank simply has funds that are where it's acted as intermediary bank processing payments, those were viewed as not central banking functions. But the record here is absolutely undisputed, and the Fed is very clear, what we are dealing with here is a classic central bank.

THE COURT: I would like to draw this to a close. If the plaintiff's side wants to have a minute to reply, the two lawyers, I will be happy to hear you, then I'm going to make a ruling.

MR. RIVKIN: Your Honor, very quickly. First of all, there is no – we don't have to worry about administering a

system, as Mr. Neuhaus suggested. There's no complication here.

The fact is that the government of Argentina made available to itself the funds that the Fed held on December 30th when we served the writ of attachment. The decree purposely left open what funds would be used to pay the IMF. And there's no doubt that they could have used the funds in the Fed to pay the IMF, so that money was there at the time.

In any event, Mr. Neuhaus described – we're not talking about a system. This isn't a bankruptcy court where you have to worry about every debtor and creditor of Argentina.

We have our two creditors here, we have our rights, we have an attachment, and the fact that they find it inconvenient in some way is by no means a reason to deny us our rights.

Every time we're here you hear about how inconvenient it is for them. Well, your Honor, they owe us three-quarters of a billion dollars, and it will be inconvenient for them to pay it, but sooner or later they will have to pay it or we'll keep coming back for the remainder except for this 100 million.

But there's no doubt we could attach this hundred million and it's not going to impact Argentina or the central banking function.

It's interesting that they keep talking about the importance of sovereignty and central banks and so forth until it no longer serves their purpose, then they go into the

commercial realm and start using branch banking rules. The central bank doesn't have branches, it's a single, solitary unit.

And also it's not complicated. The amount necessary to support the monetary system in Argentina is surely a public number. It's a publicly recorded number in the United States, it's the M1 which you see reported in the newspaper all the time. This is not complicated, as Mr. Neuhaus tried to do.

Finally the whole argument about the central banking function falls, and 1611 falls apart once you look at the property issue. That's why Mr. Neuhaus tried to evade it. But the language of 1611(b)(1) specifically says that the property that is immune from attachment is the property of a foreign central bank or monetary authority held for its own account.

There is no question that the amount of money, the unrestricted reserves that Argentina appropriated to itself in the first decree is not being held by the central bank for its own account. And therefore, all of the central bank immunity questions which Mr. Neuhaus raised fall apart.

In any event, this was a commercial – this is property of Argentina being used for a commercial purpose to repay a sovereign debt, and just like the debt that is owed to us; and we properly attached it and we hope that you will protect our rights by allowing us that attachment. And at the very least, as I said, to the extent that any ruling is based

on issues of fact that are verifiable, there ought to be more discovery.

But moreover, one last point, the stipulation which was negotiated over the weekend last weekend and entered into at the beginning of this week takes away any argument they have on prejudice. They have not argued prejudice in their briefs. Take a look at the briefs, they don't argue prejudice of this going forward. There is a way for them to maintain the central bank functions while keeping 95 percent of the 105 million that had been attached in place.

And finally, I found it amusing when Mr. Blackman talked about the ebb and flow of central bank money. They have clearly taken $2 billion out of the country, and if –

THE COURT: What about that?

MR. RIVKIN: Well –

THE COURT: Was there a balance in?

MR. RIVKIN: Last February when we were here arguing to you that they had acted improperly since your order by taking – you ordered them not to remove any assets from the country, we found a press report that showed that they had removed money from the US to the BIS, Bank for International Settlements in Switzerland. We raised that issue with you, Mr. Blackman argued up and down that this was a central bank, it was independent, it could never be dealt – he specifically said you could never use the central bank money to pay off

debts, which as we know now is not true.

And at that time Mr. Pablo Bosco put in a declaration, the same declaration which was submitted to you now, which said that at that time they had more than $2 billion in the central bank accounts in the United States.

And we know now that on December 30th when we served the order of attachment they only had $135 million. So we know that's not an ebb and flow, your Honor, that is taking money out of the country to take it out of the reach of creditors like ourselves, to take it out of your jurisdiction, despite your order to Argentina not to do so. And we have this $100 million now and we should be entitled to collect it and find other Argentine assets in this country or elsewhere to collect the rest of our debt.

Thank you, your Honor

MR. BLACKMAN: Could I respond for two seconds to that, your Honor?

THE COURT: All right.

MR. BLACKMAN: When were back here in February of 2005 we pointed out the central bank was not – didn't have counsel because it hadn't had anyone try to seize its assets at that point, that the central bank was not the Republic and the central bank was not subject to a claim or a judgment or a restraint or anything else, and therefore operated its reserves as it saw fit.

Mr. Bosco's declaration, which was filed in February of 2005, spoke to the situation as it existed between 2000 and 2002 because the article that they discovered, which had been published a year earlier, said that during that period of 2000 to 2002 the central bank had removed certain assets from New York, which was true, and sent them to the Bank for International Settlements, which was true, and as of, therefore, the end of 2002, there was a certain sum in New York.

And as we pointed out in our reply papers filed this morning to extrapolate from that, because the sum was $100 million three years later, there was something untruthful about Mr. Bosco testifying in early 2005 about the state of affairs at the end of 2002 is really not only a non-sequitur but a huge and misleading stretch. So I think that I had to say that because it's just not accurate.

MR. RIVKIN: Your Honor, we know that in 2003 you ordered Argentina not to remove any assets from the country, and we know that in February of 2003 Mr. Bosco declared in paragraph 17 – sorry, February 2005, he stated in his declaration first that the bank's liquid international reserves were $8.2 billion in January 2003, and that then in paragraph 17 that BCRA continued to maintain approximately one-third of its total liquid international reserves in New York. So that's more than $2 billion, and he so stated in February 2000.

THE COURT: What was the purpose of that affidavit? What did it relate to?

MR. RIVKIN: It related to our argument that we should be entitled to the discovery into central bank's activities because Argentina admitted to transferring billions of dollars out of the country, which we thought was in violation of your order in 2003.

THE COURT: Did you get discovery?

MR. RIVKIN: All the discovery we got was this declaration, and that was it, and so we have never – we have not been able to take more.

MR. BLACKMAN: Your Honor, this was submitted in response to your Honor's direction at the hearing, which I remember very well, which you said I don't think this should be complicated, give them some information about the movements of the central bank's reserves. That's what we're talking about, give them some information about the period of this article which was the period of 2000 to 2002.

And what Mr. Bosco is saying in this paragraph is describing what happened in that period. He said the deposits to BIS grew during this period and totalled approximately 6.1 billion year end 2002, however, BCI continued at that time, 2002, to maintain approximately one-third of its total liquid international reserves in New York.

THE COURT: Why is he saying that except to assure me

there was some huge amount of money there?
MR. BLACKMAN: He was answering your question that was limited.
THE COURT: I wasn't asking it just to be curious about how much money is in various accounts at the Fed, I guess I was asking it because I was wondering if there would be some movement which would prejudice the legitimate rights of these plaintiffs.
MR. BLACKMAN: Their question dealt with a period of two years, that's what he responded to. If you asked him for what would happen in 2003 --
THE COURT: I'm getting two different answers. He gave a declaration dated what?
MR. BLACKMAN: His declaration is dated March 14, 2005, and it speaks to a question raised about what happened.
THE COURT: Did he say what the balance was in the Fed as of March 2005?
MR. BLACKMAN: No, he did not.
THE COURT: No?
MR. BLACKMAN: No, he was not asked that question and he did not say that answer. If you asked it, he would have given the answer. Their discovery was totally directed. I hate to go back into history here. They were claiming during the period when there was a stay of decision, which ended in 2003, that ended in 2003, they claim that the Republic had

moved assets. We said: And what was their proof the central bank had moved reserves? We said: First of all, the central bank is not the Republic, it's not subject to a judgement, is not subject to a restraint, which is true. Then went on to say, in answer to your Honor's direction, tell them what happened to the central bank reserves in New York during that period, and Mr. Bosco told you.

It all was directed to their claim that money had been moved during the period of these dates. It did not speak to the date of his declaration, which was three years later. And we're happy to provide the Court with that information, but it really is not fair for Mr. Rivkin, as he did for Judge Jones and now here, to suggest that this declaration in 2005, which was speaking to a question raised specifically about what happened during the period of the stay, which expired in 2003, was somehow misleading. He wasn't talking about what happened after the period of 2001 to 2002.

MR. RIVKIN: Very briefly, we asked for that information and we didn't get that. We got a very, very vague statement that you heard so Mr. Blackman can make the argument that he made now.

You said in the argument that led to the discovery where we asked for that information but instead got this discovery declaration, you said, your Honor, if those assets were not in any way answerable to these people, why were they

maneuvering to get them out? That was that concern and is still the concern. They have always been under the order not to remove assets from your reach.

THE COURT: What do you want to do about that?

MR. RIVKIN: That's past history. What I want to do, your Honor, is keep the $105 million that we have now attached and not lose benefit of that.

THE COURT: Let met put something on the record.

Part of the big picture to me is that we have lawsuits in this Court based on bonds and related agreements in which the Republic, in order to induce investors to buy the bonds, made very broad waivers of sovereign immunity, agreed to jurisdiction in this Court, and presumably that was supposed to mean something.

What has been demonstrated by these lawsuits is how little it means. The Republic has done everything possible to avoid the fruition of the lawsuits it agreed to have brought. The Republic at one point made arguments about the standing of these plaintiffs and then went up to the Court of Appeals and there was a remand. After the remand the issue dissolved completely because it was never a substantial issue.

The Republic has done everything possible to prevent the collection of these debts in these lawsuits. Of course there is an offer of an agreement to bond holders; if they will take a certain cut, they can have new bonds and so forth.

That's fine. But the Republic originally agreed to be sued. There's no question about the right of these plaintiffs, if they establish ownership of the bond, to get judgments.

Now the next question is: Can there be any recovery on the judgments? So far it looks as if it is virtually hopeless. There's not a whimper of an idea that the Republic might pay the judgments which they really should pay. There was an absolute agreement permitting suit and it was certainly implicit that those lawsuits would be handled in a way that, if the lawsuits were valid, which they are, it was implicit that there could be collection, and the Republic is doing everything possible to frustrate that.

Now when I say everything possible, the Republic is represented by very good lawyers and very honorable lawyers who are representing their clients. The Republic has a right to raise all legal defenses. But what it illustrates is that these lawsuits may ultimately be illusory. The agreement for jurisdiction and to waive sovereign immunity may be ultimately totally illusory. And that's quite unfortunate.

Now the issue before us tonight is about the attachments and the restraint. What has happened is the plaintiffs in these lawsuits have had to resort to some quite unusual attempts to get property to either secure their prospective judgments or to apply to the judgments, and so far these efforts have not borne any real fruit because there

aren't attachable or executable assets around available. And again, the Republic is not breathing one ounce of breath indicating it will ever pay these judgments. We're told: Well, why couldn't these plaintiffs go and accept the big cut that we're offering to volunteers? Well, these plaintiffs don't have to do that.

Now on the immediate issue, I regret to say that I do not think that the attachment can stand. And I very much regret that because it simply illustrates the fact that despite all this high sounding waiver of sovereign immunity and so forth in connection with the bonds, when it comes down to it, so far it's an illusion, and I regret that. And maybe people who might consider lending money to the Republic of Argentina in the future might realize what difficulties they're going to run into if they are naive enough to rely on what the Republic offers.

But the law is the law, and what we have here is an attachment and a restraint relating to $105 million deposited by the Central Bank of Argentina in the Federal Reserve Bank in New York City. I will not try to give any ruling that will attempt to quote language of decrees, language of cases and so forth. This is going to be a brief, basic ruling. And you all know the background and you know what is referred to, and if there's an appeal, which there may be, you will know exactly what I'm referring to and certainly will brief the Court of

Appeals much more than the form in which I am speaking tonight.

But essentially the situation is that there was a decree of the Republic which – this was in December 2005, there was a decree which made a change with respect to the status of the assets of the Central Bank of Argentina. It is conceded that prior to that decree the property or the assets, the funds in the Central Bank of Argentina were the property of the central bank. Of course the Republic had a good deal of control, to say the least, but as far as property rights, the property, the funds were the property of the central bank.

The existing rules and regulations were that 100 percent of those funds were to be devoted to backing up the Argentinian currency. The decree of December basically said that there are funds which are not needed to back the currency, and it defined those unneeded funds, in the English translation, as unrestricted reserves. And the decree said the unrestricted reserves did not need to be held to back the currency, and that those unrestricted reserves could be used to pay obligations undertaken with international monetary authorities. And a later decree specifically said that about $9 billion in those reserves unrestricted would be used to pay an indebtedness of the Republic to the International Monetary Fund.

Now plaintiffs in these two cases before me contend that the first of these decrees had the effect of making the

unrestricted reserves the direct property of the Republic, and they say that since the reserves became the property of the Republic, they had a right to attach and restrain those assets of the Republic.

Now they have to show, in order to effectuate that attachment and that restraint, that this activity of repaying an international monetary institution, this would be a commercial activity. And they urge that the repayment of debt, even though it might be to the IMF, this is a commercial activity. That is their first argument.

Another argument is that the fiscal agency agreement underlying these bonds waived sovereign immunity with respect to what became the unrestricted reserves on deposit in the Central Bank of Argentina. So that's an alternative argument.

The arguments are reasonable, they are far from frivolous, but I see problems which cause me to say that even though the questions are somewhat close, the plaintiffs do not prevail.

As to the property argument, which I'll call it, you can argue both ways about whether there was a change in title to these unrestricted reserves, a change to the legal property status, and we could argue that until kingdom come and you can take rational views on both sides. But what is more important to me is that the activities of the central bank with respect to the so-called unrestricted reserves did not change with that

first decree, and surely they did not change ever, even after the payment to the International Monetary Fund, with respect to the 105 million in the Federal Reserve Bank or deposited with the Federal Reserve Bank.

So from a practical standpoint, in my view the title should be regarded as not changed. It doesn't mean that the Republic did not have some right after the first decree to call upon the central bank to pay the International Monetary Fund, but that ability does not mean that there was a literal change of property as of the time of the first decree. The Republic has always had an ability to give directions to the central bank in certain ways; that's why they were able to issue the first decree at all. So in my view, there should not be held to be some significant substantial change in the property right situation because of the first decree.

Now even if there was, we have the issue of whether the payment to the International Monetary Fund was a commercial activity. Again, there are reasonable arguments on both sides, but the weight, in my view, including the weight of the informed opinion that has been given me, is to the effect that this is not commercial activity. The payment of an obligation of the Republic of Argentina to a international lending agency, it seems to me, to be a governmental activity, a governmental financial activity and not a commercial activity. At least that's what I hold, although, as I say, there are certainly

reasonable, rational arguments on both sides of that.

Now there is a statute which specifically deals with the possibility of attachment and execution on a central bank. It's 28 USC Section 1611, and it provides that, notwithstanding Section 1610, the property of a foreign state shall be immune from attachment and execution if the property is that of a foreign central bank, unless such bank or its parent foreign government has explicitly waived its immunity from attachment in aid of execution or execution.

Now the evidence before me tips in favor of the idea, as I indicated, that the $105 million deposited by the Central Bank of Argentina in the Federal Reserve Bank in New York was, is, and continues to be the property of the central bank used for central banking functions, and thus the prohibition of Section 1611 on attaching those funds must apply. This is true unless there has been an explicit waiver.

Now the plaintiffs point to a provision which I won't try to quote because it's an enormously long paragraph, but it's a provision in the fiscal agency agreement entered into by the Republic of Argentina, which makes a very broad waiver of sovereign immunity, including a waiver as to attachments and other judicial process, except as to assets which are reserves backing the country's currency. These are not the exact words, but this is the meaning. Plaintiffs argue that this exception to the waiver of sovereign immunity must necessarily apply to

funds in the Central Bank of Argentina. They further argue that, since the exception only applies to reserves backing the currency, the exception does not apply to the reserves which became unrestricted as a result of the first decree. They assert that, by very clear implication, sovereign immunity has been waived as to the unrestricted reserves.

The problem is that our statute, Section 1611, requires an explicit waiver of immunity by the central bank for funds in a central bank, or by the parent foreign government with respect to the central bank. However, the waiver that is in the fiscal agency agreement is a waiver by the Republic. And I certainly don't want to make a kind of quibbling distinction, but it seems to me there is a distinction of substance between the kind of waiver that is in the fiscal agency agreement and the kind of waiver that is required under 1611. It seems to me that the waiver required under 1611 needs to be very, very explicitly either by the central bank or explicitly mentioning the central bank and explicitly saying what that waiver applies to. And we really don't have that here.

And it's very late, and I don't want to repeat all the discussion I went into about the problem of the funds at the Federal Reserve Bank, but if we're to consider the possibility of a waiver as to the unrestricted reserves, there is no delineation of unrestricted reserves at the Federal Reserve,

there are simply funds on deposit. And therefore, this contributes, in my view, to the problem which causes me to say that if there was to be a waiver as to the Central Bank of Argentina, it would need to be done expressly by the central bank or by the Republic explicitly naming the central bank. And it should be definite in terms of what the waiver applies to, with a definition that can be used effectively by the Federal Reserve in dealing with any attachment or restraint. There is no such thing here.

Consequently, I am granting the motion of the Central Bank of Argentina to set aside and terminate the attachment and the restraint. That motion is granted and motion to confirm the attachment is denied.

Where do we go from here?

MR. RIVKIN: Your Honor, may I make two short oral motions?

THE COURT: Yes.

MR. RIVKIN: We request your Honor to effect the stay of this order pending appeal. We know from their past actions and know from what they have said if this is not stayed, the $105 million will be out the jurisdiction very quickly.

We also know that in their papers, since the stipulation was entered into this week, they have not cited any prejudice to having the attachment in place. Since they are able to carry on the usual ebb and flow, as it was said, of the

central banking activities. The issues you've discussed, as you said, are difficult issues, we have good arguments. We believe those arguments would be made even stronger if we had the discovery that we asked for, but in any event, we would like to have a meaningful appeal, and if this order is not stayed pending that appeal, it will – it is likely we will not be able to have a meaningful appeal because the assets are not here.

THE COURT: I think all the questions that I have ruled on are imminently appealable, so I think that we should keep the stipulation in place pending the outcome of appeal.

Is there any objection that?

MR. NEUHAUS: Yes, we do have an objection. I think that the attachment should be vacated, and you've ruled on this. Obviously there's prejudice. Obviously a bank or central bank wants to be free and should be free to deal with its assets as it wishes.

THE COURT: Look, I'm going to grant the stay pending an appeal, and one reason I'm granting it is what I said at the outset.

MR. NEUHAUS: Fine.

THE COURT: And that's all there is to it.

MR. RIVKIN: Your Honor, the other – thank you very much for that. The other oral motion we would like to make is for a Section 129(2)(b) certification that there are legitimate

grounds of disagreement and controlling questions of law.

THE COURT: I will so certify.

MR. RIVKIN: As to both grounds of 129(2)(b) without my stating them on the record?

THE COURT: Sure.

MR. RIVKIN: Thank you, your Honor. We will send you an order to that effect tomorrow.

THE COURT: Why don't you – somebody better submit an order based on what I have ruled. Well, anyway I think there ought to be an order based on what I ruled, an order staying and an order granting the certification. You can all wrap it up in one order.

MR. RIVKIN: We'll work out an order.

THE COURT: Nobody's rights would be prejudiced. Thank you.

MR. RIVKIN: Thank you, your Honor.

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Date:

Docket Number: 06-0405-cv

Short Title: NML Capital, Ltd. v. The Republic of Argentina

DC Docket Number: 05-cv-2434

DC: SDNY (NEW YORK CITY)

DC Judge: Honorable Thomas Griesa

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of February, two thousand seven.

NML Capital, Ltd.,

Plaintiff-Appellant,

v.

The Republic of Argentina,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
FEB 20 2007
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellant NML Capital, Ltd. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/_____
Motion Staff Attorney

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Date:

Docket Number: 06-0406-cv

Short Title: NML Capital, Ltd. v. Rep. of Argentina

DC Docket Number: 03-cv-8845

DC: SDNY (NEW YORK CITY)

DC Judge: Honorable Thomas Griesa

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22 day of February, two thousand seven.

UNITED STATES COURT OF APPEALS
FILED
FEB 22 2007
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

NML Capital, Ltd. v. The Republic of Argentina 06-0406-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant NML Capital, Ltd. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/
Motion Staff Attorney

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
FEB 27 2007
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

Date:

Docket Number: 06-0403-cv

Short Title: EM Ltd. v. Rep. of Argentina

DC Docket Number: 03-cv-2507

DC: SDNY (NEW YORK CITY)

DC Judge: Honorable Thomas Griesa

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of February two thousand seven.

NML Capital, Ltd. v. The Republic of Argentina 06-0406-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant NML Capital, Ltd. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/

Motion Staff Attorney

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION INFORMATION STATEMENT

Docket Number(s): 06-0403-Civ; 06-0405-Civ; 06-0406-Civ

EM Ltd.

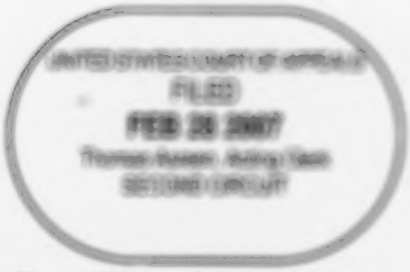
v.

The Republic of Argentina

NML Capital Ltd.

v.

The Republic of Argentina



Motion for: Stay the Mandate Pending Filing of Cert. Petition

Set forth below precise, complete statement of relief sought:
Appellants seek a stay of the mandate pending the filing of a petition for a writ of certiorari to the Supreme Court.

Moving Party: EM Ltd. and NML Capital Ltd., Plaintiff, Appellant/Petitioner

Opposing Party: The Republic of Argentina

Moving Attorney: David W. Rivkin, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
212-909-6000
dwrivkin@debevoise.com

Opposing Attorney: Jonathan Blackman, Esq.
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, New York 10006
212-225-2000
jblackman@cgsh.com

Court-Judge/Agency appealed from: Southern District of New York (Griesa, J.)

Has consent of opposing counsel: A. Been sought? No
B. Been obtained? No
Is oral argument requested? No
Has argument date of appeal been set? Yes
If yes, enter date: Appeal was heard on August 29, 2006

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? No
Requested return date and explanation of emergency: n/a

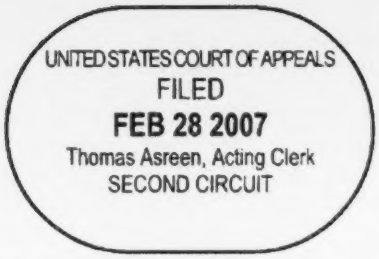
Signature of Moving Attorney:
/s/ Date: Feb. 26, 2007

Has service been effected? Yes

ORDER

Before: Hon. Ralph K. Winter, Hon. José A. Cabranes, Hon. Rosemary S. Pooler, *Circuit Judges*

IT IS HEREBY ORDERED that the motion to stay the mandate pending filing of certiorari petition is GRANTED.



FOR THE COURT:
THOMAS ASREEN, Acting Clerk
by

Date

/s/
Arthur M. Heller
Motion Staff Attorney

APPENDIX H

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 97 – JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec. 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

APPENDIX I

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 97 – JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec. 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States:

Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has

ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of

any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(I) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. – The President may waive any provision of paragraph (1) in the interest of national security.

APPENDIX J

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 97 – JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec. 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

APPENDIX K

CENTRAL BANK OF THE ARGENTINE REPUBLIC

Decree 1599/2005

Law No. 23,928 shall be amended to provide that the reserves in excess of one hundred percent backing of the monetary base may be allocated for payment of obligations undertaken with international monetary authorities, provided that those transactions result in a neutral monetary effect.

Buenos Aires, December 15, 2005

HAVING REVIEWED AND CONSIDERED:

Law No. 23,928 and the amendments thereto, and

WHEREAS

In relation to the reserves of the CENTRAL BANK OF THE ARGENTINE REPUBLIC, Articles 4, 5, and 6 of the aforementioned Law defined in their composition, purpose, method of presentation [of information] and legal status, setting forth their role in backing the monetary base, the fact that they are not subject to attachment, and their exclusive use for the purposes provided for in that precept.

At this time, there is a trade surplus, a surplus in the balance of payments current account, and a situation of fiscal solvency that makes it possible to apply part of the aforementioned reserves to address commitments to international monetary authorities, to the extend that the ONE HUNDRED PERCENT (100%) backing of the monetary base is not affected.

Consequently, it is deemed appropriate to provide that the reserves in excess of that percentage may be allocated for the payment of obligations undertaken with international monetary authorities, as long as those transactions result in a neutral monetary effect.

In this instance, exceptional circumstances make it impossible to follow the ordinary procedures provided for by the National Constitution for enacting statutes.

This measure is issued in use of the authorities conferred by Article 99, subsection 3 of the NATIONAL CONSTITUTION.

Therefore,

THE PRESIDENT OF ARGENTINA, IN GENERAL AGREEMENT OF MINISTERS

DECREES:

Article 1 — That Articles 4, 5, and 6 of Law No. 23,928 and the amendments thereto shall be replaced as follows:

" ARTICLE 4. The reserves of the CENTRAL BANK OF THE ARGENTINE REPUBLIC in gold and foreign currency shall be allocated to back up to ONE HUNDRED PERCENT (100%) of the monetary base. When the reserves are invested in deposits, other interest-bearing transactions, or domestic or foreign government securities payable in gold, precious metals, U.S. dollars, or other foreign currency of similar soundness, their computation for purposes of this law shall be at market value.

" ARTICLE 5. CENTRAL BANK OF THE ARGENTINE REPUBLIC shall reflect, on its balance sheet and financial statements, the amount, composition, and investment of the reserves, on the one hand, and the amount and composition of the monetary base, on the other hand. Reserves in excess of the percentage established in Article 4 shall be known as unrestricted reserves.

" ARTICLE 6. The assets that constitute the reserves mentioned in the preceding Articles are not subject to attachment, and may be used exclusively for the purposes provided for in this law. The reserves, up to the percentage established in Article 4, also constitute a common pledge of the monetary base. The monetary base in pesos consists of the money in circulation plus the demand deposits of the financial

institutions in the CENTRAL BANK OF THE ARGENTINE REPUBLIC, in current or special accounts.

As long as the monetary effect is neutral, the unrestricted reserves may be used for payment of obligations undertaken with international monetary authorities."

Art. 2 — This measure will take effect on the day of its publication in the Official Gazette.

Art. 3 — Let the HONORABLE CONGRESS OF THE NATION be notified in compliance with the provisions of Article 99, subsection 3 of the National Constitution.

Art. 4 — Let it be made known, published, provided to the National Directorate of the Official Register, and filed. — KIRCHNER. — Alberto A. Fernández. — Felisa Miceli. — Julio M. De Vido. — Aníbal D. Fernández. — Alberto J. B. Iribarne. — Carlos A. Tomada. — Juan C. Nadalich. — Daniel F. Filmus. — Ginés M. González García.

BANCO CENTRAL DE LA REPUBLICA ARGENTINA

Decreto 1599, 2005

Modificase la Ley Nº 23.928, con la finalidad de establecer que las reservas que excedan el respaldo del cien por ciento de la base monetaria puedan ser destinadas al pago de obligaciones contraídas con organismos financieros internacionales, siempre que esas operaciones resulten de un efecto monetario neutro.

Bs. As., 15/12/2005

VISTO:

La Ley Nº 23.928 y sus modificatorias, y

CONSIDERANDO:

Que, en relación a las reservas del BANCO CENTRAL DE LA REPUBLICA ARGENTINA, los Artículos 4º, 5º y 6º de la Ley citada definieron su composición, objeto, método de exposición y régimen jurídico, disponiendo su afectación al respaldo de la base monetaria, su inembargabilidad y su aplicación exclusiva a los fines previstos en dicha norma.

Que en la actualidad se advierten superávit comercial y de cuenta corriente en la balanza de pagos y una situación de solvencia fiscal que permiten la aplicación parcial de las referidas reservas a la atención de compromisos con organismos financieros internacionales, en la medida que no se vea afectado el respaldo del CIEN POR CIENTO (100%) de la base monetaria.

Que, en consecuencia, se considera conveniente establecer que las reservas que excedan de dicho porcentaje pueden ser destinadas al pago de obligacionas contraída con organismos financieros internacionales, siempre que dichas operaciones resulten de un efeto monetario neutro.

Que, en el case, se evidencian circunstancias excepcionales que hacen imposible seguir los trámites ordinarios previstos por la Constitución Nacional para la sanción de las leyes.

Que la presente medida se dicta en uso de las facultades conferidas por el artículo 99, inciso 3, de la CONSTITUCION NACIONAL.

Por ello,

EL PRESIDENTE DE LA NACION ARGENTINA EN ACUERDO GENERAL DE MINISTROS

DECRETA:

Artículo 1° — Sustitúyense los Artículos 4°, 5° y 6° de la Ley N° 23.928 y sus modificatorias, los que quedarán redactados del siguiente modo:

" ARTICULO 4° Las reservas del BANCO CENTRAL DE LA REPUBLICA ARGENTINA en oro y divisas extranjeras serán afectadas a respaldar hasta el CIEN POR CIENTO (100%) de la base monetaria. Cuando las reservas se inviertan en los depósitos, otras operaciones a interés, o a títulos públicos nacionales o extranjeros pagaderos en oro, metales preciosos, dólares estadounidenses o otras divisas de similar solvencia, su cómputo a los fines de esta ley será efectuará a valores de mercado.

" ARTICULO 5° EL BANCO CENTRAL DE LA REPUBLICA ARGENTINA deberá reflejar en su balance y estados contables el monto, composición e inversión de las reservas, por un lado, y el monto y composición de la base monetaria, por otro lado. Las reservas que excedan del porcentaje establecido en el artículo 4°, se denominarán reservas de libre disponibilidad.

" ARTICULO 6° Los bienes que integren las reservas mencionadas en los artículos anteriores son inembargables, y pueden aplicarse exclusivamente a los fines previstos en la presente ley. Las reservas, hasta el porcentaje establecido en el artículo 4°, constituyen, además, prenda común de la base monetaria. La base monetaria en pesos está constituida por la circulación monetaria más los depósitos a la vista de las entidades financieras en el BANCO CENTRAL DE LA

REPULICA ARGENTINA, en cuenta corriente o cuentas especiales.

Siempre que resulte de efecto monetario neutro, las reservas de libre disponibilidad prodrán aplicarse al lpago de obligaciones contraídas con organismos financieros internacionales."

Art. 2° — La presente medida entrará en vigencia partir del día de su publicación en el Boletín Oficial.

Art. 3° — Dése cuenta al HONORABLE CONGRESO DE LA NACION, en cumplimiento de lo dispuesto por el artículo 99, inciso 3, de la Constitución Nacional.

Art. 4° — Comuníquese, publíquese, dése a la Dirección Nacional del Registro Oficial y archívese. — KIRCHNER. — Alberto A. Fernández. — Felisa Miceli. — Julio M. De Vido. — Aníbal D. Fernández. — Alberto J. B. Iribarne. — Carlos A. Tomada. — Juan C. Nadalich. — Daniel F. Filmus. — Ginés M. González García.

APPENDIX L

PUBLIC DEBT

Decree 1601/2005

Ordering full payment of the debt undertaken with the International Monetary Fund with unrestricted reserves that exceed the percentage established in Article 4 of Law No. 23,928 and the amendments thereto.

Buenos Aires, 12/15/2005

HAVING REVIEWED AND CONSIDERED:

Law No. 23,928 and Decree No. 1599 of December 15, 2005, and

WHEREAS:

Article 6 of Law No. 23,928 — text in accordance with Decree No. 1599/05 — provides that the reserves of the CENTRAL BANK OF THE ARGENTINE REPUBLIC that are in excess of ONE HUNDRED PERCENT (100%) of the monetary base may be used to pay obligations undertaken with international monetary authorities, provided that the monetary effect is neutral.

The balance of payments currently reflects trade surpluses and surpluses in the current account that assure the generation of foreign currency and the sustainability of the foreign accounts.

There is also a situation of fiscal solvency that assures the strength of the economy in the face of potential unfavorable external scenarios.

Within a system of floating exchange rate, the current level of international reserves amply exceeds the margins necessary to maintain appropriate monetary and exchange policies.

The cost of current financing with international entities exceeds the yield obtained through investment of the reserves.

The policy of reducing external borrowing adopted by the Executive Branch allows for more flexibility in the design and execution of economic policies.

Use of part of the reserves to address commitments to international monetary authorities does not affect the maintenance of an appropriate level of liquidity that would permit us to deal with abrupt changes in financial conditions.

Given these circumstances, it is necessary and appropriate to order [implementation of] the mechanisms for payment of the pending debt to the INTERNATIONAL MONETARY FUND.

For this purpose, the MINISTRY OF ECONOMY AND PRODUCTION is instruction to take the pertinent steps.

This measure is ordered in use of the authorities conferred by Article 99 subsection 1) of the NATIONAL CONSTITUTION and Article 6 of Law No. 23,928 and the amendments thereof.

Therefore,

THE PRESIDENT OF ARGENTINA

DECREES:

Article 1 — Full payment of the debt undertaken with the INTERNATIONAL MONETARY FUND shall be ordered, using unrestricted reserves that are in excess of the percentage established in Article 4 of Law 23,928 and the amendments thereto, provided that the monetary effect is neutral.

Art. 2 — The MINISTRY OF ECONOMY AND PRODUCTION shall be instructed to make, through the CENTRAL BANK OF THE ARGENTINE REPUBLIC, full payment of the debt undertaken with the INTERNATIONAL MONETARY FUND, using the aforementioned reserves.

Art. 3 — The MINISTRY OF ECONOMY AND PRODUCTION shall be authorized to adopt the necessary measures to implement the order set forth in the preceding article.

Art. 4 — This decree will take effect on the day of its publication in the Official Gazette.

Art. 5 — Let it be made known, published, provided to the National Directorate of the Official Register, and filed. — KIRCHNER. — Alberto A. Fernández. — Felisa Miceli.

DEUDA PUBLICA

Decreto 1601/2005

Dispónese la cancelación total de la deuda contraída con el Fondo Monetario Internacional con reservas de libre disponibidad que excedan el porcentaje establecido en el Arttículo 4° de la Ley N° 23.928 y sus modificaiones.

Bs. As, 15/12/2005

VISTO:

La Ley N° 23.928 y el Decreto N° 1599 del 15 de diciembre de 2005, y

CONSIDERANDO:

Que el Artículo 6° de la Ley N° 23.928 —texto según el Decreto N° 1599/o05— dispone que las reservas del BANCO CENTRAL DE LA REPUBLICA ARGENTINA que excedean el CIEN POR CIENTO (100%) de la base monetaria podrán aplicarse al pago de obligaciones contradídas con organismos financieros internacionales, siempre resulte de efecto monetario neutro.

Que la balanza de pagos registra en la actualidad superávits comercial y de cuenta corriente que eseguarn la generación de divisas y la sustenatabilidad de las cuentas externas.

Que asimiso, se advierte una situación solvencia fiscal que permite asegurar la fortaleza de la economía ante eventuales escenarios externos desfavorables.

Que dentro de un régimen ded cambio flotante, el nivel actual de reservas internacionales supera con amplitud los márgenes necesarios para mantener adecuadas politicas monetarias y camiarias.

Que el costo de los financiamientos vigentes con organismos internacionales supera al rendimiento obtenido por la colocación de las reservas.

Que la política de reducción del endeudamiento externo adoptada por el Poder Ejecutivo Nacional permite obtener una mayor flexibilidad en el diseño y ejecución de las políticas económicas.

Que la aplicación parcial de las reservas a la atención de compromisos con organismos financieros internacionales no afecta el mantenimiento de un adecuado nivel de liquidez que permita enfrentar cambios abruptos en las condiciones financieras.

Que dadas la circunstancias reseñadas, resulta necesario y coveniente proceder en esta instancia a disponer los mecanismos conducentes al pago de la deuda pendient con el FONDA MONETARIO INTERNACIONAL.

Que a tal fin se instruya al MINISTERIO DE ECONOMIA Y PRODUCCION para que ejecute las medidas pertinentes.

Que la presente medida se dicta en uso de las atribuciones conferidas por el Artículo 99 inciso 1) de la CONSTITUCION NACIONAL, y por el Artículo 6° de la Ley N° 23.928 y sus modificaciones.

Por ello,

EL PRESIDENTE DE LA NACION ARGENTINA

DECRETA:

Artículo 1° — Dispónese la cancelación total de lla deuda contraída con el FONDO MONETARIO INTERNACIONAL con reservas de libre disponibilidad ue excedan el porcentaje establecido en el Artículo 4° de la Ley 23.928 y sus modificaciones, siempre que resulte de efecto monetario neutro.

Art. 2° — Instrúyese al MINISTERIO DE ECONOMIA Y PRODUCCION para aque a través del BANCO CENRAL DE LA REPUBLICA ARGENTINA proceda a cancelar la deuda total contraída con el FONDO MONETARIO INTERNACIONAL con las reservas precitadas.

Art. 3° — Facúltase el MINISTERIO DE ECONOMIA Y PRODUCCION a adoptar las medidas necesarias a fin de poner en ejecución la manda indicada en el artículo anterior.

Art. 4° — El presente decreto entrará en vigencia a partir de día de su publicación en el Boletín Oficial.

Art. 5° — Comuníquese, publíquese, dése a la Dirección Nacional del Registro Oficial y archívese. — KIRCHNER. — Alberto A. Fernández. — Felisa Miceli.

APPENDIX M

[LOGO]
TRANSPERFECT
TRANSLATIONS

City of New York, State of New York, County of New York

I, Jessica Majestic, hereby certify that the following is, to the best of my knowledge and belief, a true and accurate translation of the attached Resolution No. 49 from Spanish into English.

/s/
Signature

Sworn to before me this 5th day of January, 2006

/s/
Signature, Notary Public

[SEAL]

Stamp, Notary Public

Ministry of Economy and Production

Resolution No. 49

Buenos Aires, December 29, 2005

IN VIEW OF File No. S01:0442691/2005 of the Registry for the MINISTRY OF ECONOMY AND PRODUCTION, Laws 11, 672 Complementary Permanent Budget Law (consolidated text as of 2005) and 23,928, Decrees 1599 dated December 15, 2005 and 1601 dated December 15, 2005; and

WHEREAS:

Article 1 of Decree 1599 dated December 15, 2005 replaces Articles 4, 5, and 6 of Law 23,928, which define the composition, objective, method of exposition and legal regime for the reserves of the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA.

The foregoing Decree stipulates that freely-available reserves, as defined under Article 5 *in fine* of Law 23,928, as amended by Decree No. 1599/05, may be applied to repay obligations incurred with international financial agencies, provided they cause a neutral monetary effect.

Along these lines, the NATIONAL EXECUTIVE BRANCH issued Decree No. 601 dated December 15, 2005 that stipulates, in its Article 1, the repayment in full of the debt incurred with the INTERNATIONAL MONETARY FUND with freely-available reserves exceeding the percentage determined under Article 4 of Law 23,928, as amended.

Article 2 of the Decree mentioned in the whereas clause above also instructs this Ministry to act accordingly through the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA.

Additionally, Article 3 of Decree No. 1601/05 further empowers the MINISTRY OF ECONOMY AND PRODUCTION to adopt the measures needed to carry out the order indicated in the above-mentioned Decree.

Within the legal framework from the transactions conducted with the INTERNATIONAL MONETARY FUND and due to the repayment ordered, it seems advisable to settle the liabilities of the NATIONAL GOVERNMENT stemming from the obligation payable to the INTERNATIONAL MONETARY FUND out of assets included on the balance sheet of the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA, in compliance with the provisions laid down under Article 44 of Law 11, 672 Complementary Permanent Budget Law (consolidated text as of 2005);

The General Bureau for Legal Affairs of the MINISTRY OF ECONOMY AND PRODUCTION has taken part I this issue within the scope of its jurisdiction.

This decision is adopted by virtue of the powers granted under Article 3 of Decree 1601/05.

THEREFORE,

THE MINISTER OF ECONOMY AND PRODUCTION

DOES HEREBY DECIDE:

ARTICLE 1 – Let the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA be instructed in line with Decree No. 1599 dated December 15, 2005 and the provisions of Article 1 of Decree No. 1601 of December 15, 2005 to repay the debt incurred with the INTERNATIONAL MONETARY FUND.

ARTICLE 2 – Let the SECRETARIAT OF THE TREASURY and the SECRETARIAT OF FINANCE, both reporting to this Ministry, be instructed to implement an exchange of liabilities held by the NATIONAL GOVERNMENT with the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA as compensation for the transactions conducted with the INTERNATIONAL MONETARY FUND, pursuant to Article 44 of Law No. 11,672 Complimentary Permanent Budget Law (consolidated text as of 2005), by means of the instrument detailed under Article 3 herein.

ARTICLE 3 – ONE (1) Non-transferable Note shall be issued having the following financial conditions:

Currency: United States Dollars
Term: TEN (10) years as from its date of issuance.
Amortization: on maturity date in full.
Interest: it shall bear interest at the same interest rate applicable to the international reserves of the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA for the same term and up to a cap equal to the annual LIBOR rate minus ONE (1) Percentage Point, payable on a half-yearly basis.

ARTICLE 4 – The SECRETARIAT OF THE TREASURY and the SECRETARIAT OF FINANCE, both reporting to the MINISTRY OF ECONOMY AND PRODUCTION, shall be the Authority in charge of Applying this resolution, being empowered to issue any such supplementary and/or explanatory regulations that may be required.

ARTICLE 5 – Let this Resolution be communicated, published and given to the National Bureau of the Official Registry and archived.

RESOLUTION No. 49

[signature]

Felisa Miceli
Minister of Economy and
Production

[SEAL]

Ministro de la Economía y Producción

49 ~ •

Buenos Aires, 29 Dic 2005

VISTO el Expediente Nº S01:0442691/2005 del Registro del MINISTERIO DE ECONOMIA Y PRODUCCION, las Leyes Nº 11,672 Complementaria Permanente de Presupuesto (T.O. 2005) y Nº 23, 928, los Decretos Nros. 1.599 de fecha 15 de diciembre de 2005 y 1.601 de fecha 15 de diciembre de 2005, y

CONSIDERANDO:

Que por el Artículo 1º de Decreto Nº 1.599 de fecha 15 de diciembre de 2005 se sustituyen los Artículos 4º, 5º y 6º de la Ley Nº 23.928, por los que se definen la composición, objeto, método de exposición y régimen jurídico de las reservas del BANCO CENTRAL DE LA REPUBLICA ARGENTINA.

Que por el citado Decreto se establece que siempre que resulte de efecto monetario neutro las reservas de libre disponibilidad, conforme se las define en el Artículo 5º in fine de la Ley Nº 23.928 con la modificación introducida por el Decreto Nº 1.599/05, podrán aplicarse al pago de obligaciones contraídas con organismos financieros internacionales.

Que, en tal sentido, el PODER EJECUTIVO NACIONAL dictó el Decreto Nº 1.601 de la fecha 15 de diciembre de 2005 por el cual se dispone, en su Artículo 1º, la cancelación total de la deuda contraída con el FONDO MONETARIO INTERNACIONAL con reservas de libre disponibilidad que excedan el porcentaje establecido en el Artículo 4º de la Ley 23.928 y sus modificaciones.

Que, asimismo, por el Artículo 2º del Decreto mencionado en el considerado anterior, se instruye a este Ministerio para que a través del BANCO CENTRAL DE LA REPUBLICA ARGENTINA se proceda en tal sentido.

Que, adicionalmente, el Artículo 3° del Decreto N° 1.601/05 faculta al MINISTERIO DE ECONOMIA Y PRODUCCION a adoptar las medidas necesarias a fin de ejecutar la manda indicada en el citado Decreto.

Que en el marco legal resultante de las operaciones con el FONDO MONETARIO INTERNACIONAL y dada la cancelación que se dispone, resulta procedente atender los pasivos del GOBIERNO NACIONAL que constituyen activos incorporados en el balance del BANCO CENTRAL DE LA REPUBLICA ARGENTINA derivados de la obligación con el FONDO MONETARIO INTERNACIONAL, ello, en los términos del Artículo 44 de la Ley N° 11.672 Complementaria Permanente de Presupuesto (T.O. 2005).

Que la Dirección General de Asuntos Jurídicos del MINISTERIO DE ECONOMIA Y PRODUCCION ha tomado la intervención que le compete.

Que la presente medida se dicta en virtud de las facultades conferidas por el Artículo 3° del Decreto N° 1.601/05.

Por ello,

LA MINISTRA DE ECONOMIA Y PRODUCCION

RESUELVE:

ARTICULO 1° – Encomiéndase al BANCO CENTRAL DE LA REPUBLICA ARGENTINA, en el marco del Decreto N423 1.599 de fecha 15 de diciembre de 2005 a cancelar el total de la deuda contraída con el FONDO MONETARIO INTERNACIONAL.

ARTICULO 2° – Instrúyese a la SECRETARIA DE HACIENDA y a la SECRETARIA DE FINANZAS ambas de este Ministerio, a implemmentar el canje de los pasivos que el GOBIERNO NACIONAL mantiene con el BANCO CENTRAL DE LA REPUBLICA ARGENTINA como contrapartida de las operaciones con el FONDO MONETARIO INTERNACIONAL, en los términos del Artículo 44 de la Ley

Nº 11.672 Complementaria Permanente de Presupuesto (T.O. 2005)) por el instrumento que se detalla en el artículo 2º de la presente resolución.

ARTICULO 2º – Se emitirá UNA (1) Letra intransferible con las siguientes condiciones financieras:

Moneda: dólares estadounidenses

Plazo: DIEZ (10) años a partir de la fecha de emisión.

Amortización: íntegra al vencimiento.

Interés: devengará interés igual a la tasa de interés que devenguen las reservas internacionales del BANCO CENTRAL DE LA REPUBLICA ARGENTINA para el mismo período y hasta un máximo de la tasa LIBOR anual menos UN (1) Punto porcentual, pagaderos semestralmente.

ARTICULO 4º – La SECRETARIA DE FINANZAS y la SECRETARIA DE HACIENDA, ambas del MINISTERIO DE ECONOMIA Y PRODUCCION, serán la Autoridad de Aplicación de la presente resolución, estando facultadas para dictar las normas complementarias y/o aclaratorias correspondientes.

ARTICULO 5º – Comuníquese, publíquese, dése a la Dirección Nacional de Registro Oficial y archívese.

RESOLUCION Nº 49 – e

[Firma]

Felisa Miceli
Ministra de Economía y
Producción

APPENDIX N

ISI EMERGING MARKETS
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Project Code: None Selected
Publication: *La Nación – Economía*
Provider: *La Nación*
Date: February 5, 2004

The Government is protecting itself from attachment.

It has withdrawn reserves and funds from Banco Nación in New York; is studying post-default payment of bonds by means of trusts.

Once again Argentines have been asked by their leaders to remain clam. This week Alberto Fernández, Cabinet chief, confirmed that the assets of the country are safe from the threat of attachments requested by foreign creditors, a risk that had been growing since the way was cleared last Saturday for claims in the United States.

Reserves of the Central Bank of the Argentine Republic on deposit in New York banks have been withdrawn, funds on deposit in the New York branch of Banco Nación have been repatriated, and salaries of Argentine officials posted to other countries are being deposited in Argentina or paid in the form of cash sent via diplomatic pouch, which has immunity. The presidential plane is avoiding landing in countries where bondholders have called for attachments, including Germany. The Frigate "*Libertad*" is also avoiding ports of these countries.

The Ministry of Economics is paying foreign bondholders of Boden bonds in Argentina. These payments are being made regularly because they concern debt issued after the default in December 2001. A number of measures implemented secretly by this government its predecessors have already been

discovered by bondholders who are suing the country in foreign courts.

A spokesperson for the Ministry of Economics stated that Argentina is not concealing its assets and is participating in the discovery proceeding with creditors in the United States in order to inform them of the assets subject to dispute. A Ministry technical expert declined to reveal how the Government is avoiding attachments, on the grounds that this would "stir up" the plaintiffs.

Argentina has been protecting assets since August 2001, when then-President Fernando de la Rúa and Economics Minister Domingo Cavallo denied the possibility of default. At that time Cavallo ordered Roque Maccarone, then president of the Central Bank, to transfer reserves from the New York branch of Deutsche Bank to the Bank for International Settlements in Basel, Switzerland.

Reserves are protected by sovereign immunity, in the United States and other countries, but Argentina preferred not to run the risk that a judge would attach them on the grounds that in fact they were funds belonging to the Executive Branch rather than to the Central Bank of the Argentina Republic. For this reason they were sent to the Bank for International Settlements, which holds only reserves of the central banks of the entire world, so that there would be no opportunity for confusion. "Our aim is to keep them from putting what is Government money into reserves," Central Bank sources admitted.

The monetary authority thus withdrew all its New York reserves in Deutsche Bank, Citibank, and the Federal Reserve (the central bank of the United States) before and for several months following the default, according to sources speaking for the creditors. Some of it was taken to Buenos Aires. "This is deliberate bankruptcy fraud," declared the attorney for the U.S. bondholders. "For this reason we are going to ask Thomas Griesa (the New York judge who is hearing the cases against

Argentina) to consider the assets that the country had before the default and to nullify the transfers to Basel," he added.

Some 80% of the Central Bank reserves have been concentrated in the Bank for International Settlements, but the operation has not been without its cost. The interest rate in Basel is 0.125 percentage points lower than the rate paid in private banks in the United States. This means a loss of 130 million pesos in interest in the past two years.

The Kirchner administration is depositing dollars for payments on National State bonds in the local Caja de Valores. Foreign bondholders prefer this system because it ensures payment. The Ministry of Economics is already thinking about how to pay creditors who agree to exchange defaulted debt for new bonds. One option is to send the money to a trust for creditors. "They say that the trust is a vehicle and is not part of the assets of the debtor," explains the attorney for the bondholders.

Multilateral agencies are being paid in Argentina or at the Bank for International Settlements. One of the few attachments has been executed in Italy on a small portion of the 75 million euro loan made to the Government for small and medium-sized companies.

By Alejandro Rebossio

La Nación Editorial Staff Member

[LOGO]

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El Gobierno se protege de los embargos

Retiró de Nueva York reservas y fondos del Banco Nación; estudia pagar los bonos posdefault mediante fideicomisos

A los funcionarios en el exterior se les paga en la Argentina o con valija diplomática El Tango 01 y la Fragata Libertad evitan países donde existen amenazas de embargos

Una vez más los argentinos recibieron un llamado a la tranquilidad de parte de sus gobernantes. Esta semana, el jefe de Gabinete, Alberto Fernández, afirmó que los bienes del país están resguardados de la amenaza de embargos pedidos por acreedores extranjeros, un riesgo creciente desde que el sábado pasado se dio vía libre a los reclamos en Estados Unidos.

Se retiraron reservas del Banco Central (BCRA) que estaban depositadas en bancos de Nueva York, se repatriaron fondos del Banco Nación que estaban en su sucursal neoyorquina y están pagándose los sueldos de funcionarios en el exterior con depósitos en la Argentina o enviándoles el dinero en la llamada valija diplomática, que goza de inmunidad. El avión presidencial evita los aterrizajes en países donde los tenedores de bonos han pedido embargos, como Alemania. La Fragata Libertad también esquiva esos puertos.

El Ministerio de Economía les paga en la Argentina a los tenedores extranjeros de Boden, cuyos vencimientos se abonan con regularidad porque se trata de deuda emitida tras la cesación de pagos de diciembre de 2001. Se trata de una diversidad de medidas que este gobierno y los anteriores han practicado con sigilo, pero que ya han sido advertidas por los bonistas que demandan al país en tribunales foráneos.

Un vocero de Economía afirmó que la Argentina no oculta sus bienes y participa del proceso judicial de discovery (descubrimiento) con los acreedores en Estados Unidos para informarles de los bienes sujetos al litigio. Un técnico del ministerio se negó a revelar cómo el Gobierno esquiva los embargos porque "avivaría" a los demandantes.

La Argentina viene protegiendo activos desde agosto de 2001, cuando el entonces presidente, Fernando de la Rúa, y su ministro de Economía, Domingo Cavallo, negaban la posibilidad de default. En aquel entonces Cavallo le ordenó al entonces presidente del Banco Central, Roque Maccarone, que transfiriera reservas desde la sede neoyorquina del Deutsche Bank al Banco Internacional de Pagos (BIP) de Basilea, Suiza.

Las reservas están resguardadas por la inmunidad soberana, incluso en Estados Unidos, pero la Argentina prefirió abortar el riesgo de que un juez las embargara aduciendo que en realidad no pertenecían al BCRA, sino que eran recursos del Ejecutivo. Por eso, las envió al BIP, donde sólo hay reservas de los bancos centrales de todo el mundo y, de ese modo, no se dejó lugar a la confusión. "Nosotros tratamos de que no nos metan en reservas dinero que es del Gobierno", admitieron fuentes del Central.

Así fue cómo la autoridad monetaria retiró todas las reservas que tenía en Nueva York, en el Deutsche Bank, el Citibank y la Reserva Federal (banco central norteamericano), antes del default y en los primeros meses posteriores, según fuentes de los acreedores. Algo se trajo a Buenos Aires. "Es un fraude insolventarse a propósito", advirtió el abogado de tenedores de

bonos en Estados Unidos. "Por eso vamos a pedir a Thomas Griesa (el juez de Nueva York que atiende las demandas contra la Argentina) que considere los bienes que el país tenía antes del default y deje sin efecto las transferencias a Basilea", agregó.

En el BIP ha pasado a concentrarse alrededor del 80% de las reservas del Banco Central, pero la operación ha tenido su costo. En Basilea se paga un 0,125 punto porcentual menos de tasa de interés que en los bancos privados de Estados Unidos. Por lo tanto, se perdieron $ 130 millones de rendimiento en los últimos dos años.

La administración Kirchner está depositando en la Caja de Valores local los dólares por los vencimientos de los Boden y los tenedores del exterior así lo prefieren para asegurarse el cobro. Economía ya está pensando cómo les pagará a los acreedores que acepten el canje de la deuda en default por nuevos bonos. Una opción consiste en enviar el dinero a un fideicomiso de los acreedores. "Dicen que el fideicomiso es un vehículo y está fuera del patrimonio del deudor", explica el abogado de los tenedores.

A los organismos multilaterales se les paga en la Argentina o en el BIP. Uno de los pocos embargos se concretó en Italia contra una partida reducida del crédito de 75 millones de euros al Gobierno para las pymes.

Por Alejandro Rebossio
De la Redacción de LA NACION

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IN THE

Supreme Court of the United States

EM LTD. and NML CAPITAL, LTD.,

Petitioners,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does a foreign state's authorization of its central bank to repay the state's debt to the International Monetary Fund (the "IMF") expose central bank reserves to attachment or execution by the state's judgment creditors, regardless of whether the particular reserves sought to be attached were used, or intended to be used, for this purpose?

(2) Does a district court abuse its discretion in refusing to permit discovery from a foreign state and its non-party central bank in connection with a motion to attach the central bank's reserves when no discovery requests were served, the party seeking the attachment only alludes to a desire for discovery in its brief below and then disclaims the need for it, and discovery would not change the court's holding that the property at issue is immune from attachment or execution, but would intrude upon the sovereignty of the foreign state?

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SUMMARY OF THE ARGUMENT

This case concerns the attempt by two holdout creditors of the Republic of Argentina (the "Republic") to attach and restrain foreign reserves of the Republic's central bank, Banco Central de la República Argentina ("BCRA"), held in BCRA's accounts at the Federal Reserve Bank of New York (the "FRBNY"). Petitioners EM Ltd. ("EM") and NML Capital, Ltd. ("NML") concede, as they must, that those reserves would ordinarily be central bank property immune from attachment and execution under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA"). *See* Pet. 13, 14; App. 18a. They contend, however, that BCRA's reserves at the FRBNY became attachable assets of the Republic when the President of Argentina issued two executive decrees (collectively, the "Decrees") that authorized BCRA to use a portion of its reserves for repayment of the Republic's debt to the IMF, with the Republic's reimbursement of BCRA due at a later date. Pet. 3-4. The court of appeals rejected this "appropriation" argument, App. 19a, and held that the reserves on deposit at the FRBNY that petitioners sought to attach at all times remained property of BCRA. It also concluded, as an alternative holding, that a foreign state's relationship with the IMF is not "commercial activity" within the meaning of the FSIA, that repayment of the state's borrowings from the IMF with central bank reserves is therefore not "use" of that property for a commercial activity so as to subject those reserves to execution under § 1610(a) of the FSIA even if they were property of the state, and that the attached reserves at the FRBNY were not in any event used for, or designated for use, for that purpose.

BCRA's separate opposition sets forth the reasons why its reserves are protected from attachment and execution under the FSIA and cannot be used to satisfy judgments

against the Republic, and why the unique and unlikely to be repeated question of the effect of the Argentine Decrees on the ownership of BCRA's property (and petitioners' other questions based on the court of appeals' alternative holdings) are unworthy of this Court's discretionary review on certiorari. The Republic joins in BCRA's position, but writes separately in opposition to the Petition to highlight the errors and omissions in EM and NML's presentation of the factual and procedural background of these cases, as well as to show that the purported circuit split on a discovery issue raised at the eleventh hour by one of the petitioners, EM, is wholly invented and patently not worthy of a writ of certiorari. *See* Sup. Ct. R. 15(2).

BACKGROUND

A. The Republic's Economic Crisis And The Sovereign Debt Restructuring Process

Between 1998 and 2002, the Republic experienced the worst economic crisis of its modern history, marked by an enduring recession, fiscal imbalance, and lack of access to the international capital markets. *See* Decl. of Noemi C. LaGreca, dated June 11, 2003 ¶¶ 4-13, *EM Ltd. v. Republic of Argentina*, 03 Civ. 2507 (TPG) (S.D.N.Y.); Decl. of Federico Carlos Molina, dated Mar. 24, 2005 ("Molina Decl.") ¶ 3, *NML Capital, Ltd. v. Republic of Argentina*, 03 Civ. 8845 (TPG) (S.D.N.Y.); *see also* Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA 1 (2005) (describing collapse of Argentine economy in 2001 as "one of the most spectacular in modern history"). As a result of declining exports because of fixed exchange rates, rising interest rates and declining tax collections, the Argentine state was

essentially bankrupt. With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period. Blustein, *supra*, at 1, 185-87.

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden—some $80 billion in public external debt alone—while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine populace. "[U]nable to service its debt," the Republic was forced to defer interest and principal payments to its bondholders. Panel of Independent Advisors, *Economic and Financial Issues Facing Argentina*, IMF News Brief No. 02/80, July 29, 2002, ¶ 1, *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm; Molina Decl. ¶ 4. This "refusal to make scheduled payments" under these extreme circumstances was not an arbitrary decision by the Republic not to pay its debts, as EM and NML charge. Pet. 2. Just as the United States Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), neither were the terms of the Republic's agreements with its external debt holders. Like many nations over the course of history that have had to restructure their debt in times of economic crisis, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, ALEXANDER HAMILTON: A BIOGRAPHY 163-88 (1982), the Republic was forced to seek restructuring of both its external and internal public debt.

Of course there is no bankruptcy regime for insolvent states, so the Republic's external debt restructuring was necessarily on an entirely voluntary basis. The Republic did not repudiate that debt. Instead, consistent with United States government policy favoring the orderly and consen-

sual restructuring of sovereign debt, the Republic restructured its unsustainable debt load in 2005 through a global exchange offer in which participating bondholders exchanged old, nonperforming bonds for new, performing bonds with lower interest rates, reduced principal, and/or longer maturities. The exchange offer was extended to all beneficial owners of eligible bonds on the same terms and reflected the Republic's commitment to treat its private creditors equitably.[1] Approximately $62.5 billion in principal amount, or over 76% of the aggregate eligible debt, was tendered in the exchange offer, making it the largest sovereign debt restructuring in history. Molina Decl. ¶ 7.[2]

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[1] EM and NML's criticism of the Republic for not "offer[ing] anything to bondholders that did not accept its exchange offer," Pet. 2, is hardly fair. Petitioners and other holdout creditors had the opportunity to participate in the exchange offer, which they chose to reject and indeed attempted through litigation to block other creditors from accepting. The Republic's announcement that it would not resume payments on non-tendered bonds was critical to the success of the exchange offer, as bondholders would not agree to incur substantial "haircuts" on their holdings if there were a reasonable possibility that non-tendering bondholders would be voluntarily paid in full at some later date.

[2] The Republic therefore did not "walk away from [its] legal and financial obligations," as petitioners and their partisan commentators would have it. Pet. 9 (quoting Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 316 (2005)). Professor Porzecanski's bias against insolvent sovereign debtors is clear from his far from scholarly rhetoric, which maligns them as not only "rogue" debtors "that pose the greatest threat to the integrity and efficiency of the international financial architecture" but also as "sovereign deadbeat[s]." Porzecanski, *supra*, at 331. Professor Hal S. Scott, whom petitioners also cite at length, *see* Pet. 12, 24, upon information and belief, has been for the last several years a paid consultant to certain sovereign creditors, including the parent of NML.

B. Petitioners Chose Not To Participate In The Republic's Debt Restructuring

EM and NML are Cayman Islands entities set up by creditors that are in the business of buying distressed sovereign debt and subsequently speculating in litigation against the issuing states.[3] Both acquired beneficial interests in Republic bonds at a deep discount immediately before and after the Republic suspended payments on its unsustainable external debt in December 2001; NML has in fact continued, as recently as March 2007, to buy nonperforming Republic debt and then bring suit for nonpayment. Their business strategy seeks to take advantage of the fact that, as noted above, insolvent sovereigns, unlike private borrowers, cannot invoke the protection of a bankruptcy regime; the Republic has no recourse to an automatic stay of litigation or protection from enforcement procedures as a private debtor would, and interest on judgments against the Republic continues to run indefinitely rather than stopping on the date of a bankruptcy filing.

Because EM and NML's business strategy depends upon aggressive litigation, they have not surprisingly engaged in

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[3] *See, e.g., CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*, 886 F. Supp. 1105, 1107-08 (S.D.N.Y. 1995) (describing attempt to interfere with Brazil's debt restructuring by owner of EM); *see also Elliott Assocs., L.P. v. Republic of Peru*, 12 F. Supp. 2d 328, 331-32, 355-56 (S.D.N.Y. 1998) (describing sovereign debt litigation by parent of NML and holding that its acquisition of Peru's defaulted debt violated New York champerty law), *rev'd sub nom. Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 381 (2d Cir. 1999) (holding that creditor did not violate champerty law); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 635-36 (ABA Publ'ns Feb. 2001) (describing Elliott's attachment of payments to be made by Peru on restructured debt).

a series of previous attachment and execution efforts against the Republic. NML obtained *ex parte* attachments of diplomatic and military property of the Republic in early 2004, and both petitioners made *ex parte* attempts to attach the bonds tendered in the Republic's exchange offer in the first half of 2005. Courts rejected each of these efforts. *See EM Ltd. v. Republic of Argentina*, 131 Fed. Appx. 745, 746-47 (2d Cir. 2005) (affirming vacatur of attachments of tendered bonds); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-0197 (CKK), slip op. at 1 n.2 (D.D.C. Aug. 3, 2005) (quashing *ex parte* writs of attachment of diplomatic property). In December 2005, EM and NML attached, again on an *ex parte* basis, BCRA's reserves at the FRBNY; the district court's vacatur of these attachments was affirmed by the court of appeals in the decision that is the subject of their instant petition. More recently, in a separate proceeding in September 2006, EM and NML moved to attach the same reserves under an alter ego theory; that motion is fully briefed and pending before the district court.

EM and NML repeatedly complain that they cannot enforce judgments against the Republic because the Republic has "secrete[d] and shield[ed] its assets to prevent bondholders from using legal process to obtain the amounts they are owed," Pet. 2; *see also id.* at 11, 12, but as the foregoing description makes clear, their lack of success has been due to the federal courts' decisions that their enforcement efforts have violated the limits of the FSIA or are otherwise improper. When Congress crafted the FSIA, it decided to limit the scope of execution on a foreign state's property to a significantly greater extent than it limited the scope of jurisdiction over *in personam* suits against foreign states. *Compare* 28 U.S.C. § 1605 *with id.*

§§ 1609-1611; *see Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002); *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *see also* H.R. Rep. No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626.

These Congressional decisions in the FSIA necessarily impact EM and NML's chosen business strategy of litigating against states. EM and NML are free to sue the Republic, or any other sovereign in financial distress, and obtain judgments that they can try to enforce. Their ability to execute upon a judgment, however, is significantly constrained by the FSIA's limitations on the seizure of a foreign state's property. As discussed in BCRA's brief, attachment and execution under the FSIA are limited to property of a foreign state that is in the United States and used for a commercial activity in the United States. *See* 28 U.S.C. §§ 1609, 1610(a); Br. of Banco Central de la República Argentina in Opp'n to Pet. for Writ of Certiorari ("BCRA Br.") at 18-22. Property of a foreign central bank held for its own account, which the district court correctly held to include BCRA's reserves at the FRBNY, enjoys even greater protections. *See* 28 U.S.C. § 1611(b)(1); BCRA Br. at 26-27. EM and NML, which have chosen to make a business of buying and suing on distressed sovereign debt, can hardly complain about the fact that Congress has imposed obstacles to that business.

C. Petitioners' Previous Overbroad Discovery Demands

As another facet of their litigation strategy, EM and NML have pursued asset discovery of the Republic that is overbroad and inappropriate (since November 2003, in

EM's case). Asset discovery under the FSIA is limited to the narrow confines of a foreign state's property that is in the United States and used for a commercial activity in the United States, which is the only sovereign property that may be attached or executed against. EM and NML have nevertheless in the past sought discovery concerning property that does not belong to the Republic (*e.g.*, property of the Republic's agencies and instrumentalities such as BCRA, which are presumptively separate from the Republic and not liable for the Republic's debts), property of the Republic that is not in the United States, and property of the Republic that is not used for a commercial activity in the United States. In response to these earlier requests, BCRA, although not a party to petitioners' claims against the Republic, voluntarily provided detailed information regarding itself and movements of its reserves. *See* Decl. of Juan Basco, dated Mar. 14, 2005, ¶¶ 3-20, *EM Ltd. v. Republic of Argentina*, 03 Civ. 2507 (TPG) (S.D.N.Y.).

Ironically, despite these earlier efforts, in the proceeding below for which they seek certiorari review in this Court, EM and NML uncharacteristically sought no discovery and further argued that no discovery was necessary to adjudicate their claims. *See* App. 62a. The record contains no discovery requests by EM or NML—no interrogatories under Fed. R. Civ. P. 33, no document requests under Fed. R. Civ. P. 34, no notices of deposition under Fed. R. Civ. P. 30—because none were served. The thin reed on which petitioners' entire argument for discovery review by this Court rests is a "request" made in the concluding paragraph of their district court brief, effectively withdrawn by EM at oral argument, that the district court "leave the Attachments in place until Plaintiffs can obtain discovery and develop a complete record," and listing five possible top-

ics for such discovery. Mem. in Supp. of Pls.' Mot. to Confirm Attach. & Restraining Orders & in Opp'n to Mots. of Republic of Argentina & Banco Central de la Republica Argentina to Vacate those Orders, dated Jan. 10, 2006, at 28-29. At oral argument in the district court two days later, on January 12, 2006, EM did not pursue this throwaway request, but instead told the district court, "If you would like to later, we can talk about the specific discovery issues, but we don't think discovery is needed in order to confirm the attachments at this time." App. 62a. The district court, unsurprisingly, therefore did not even address any question of discovery in its oral ruling vacating the *ex parte* attachments.

When EM, but not NML, later raised the district court's supposed denial of discovery on appeal, the court of appeals noted that there was no "part of the record demonstrating that these specific requests were made to the District Court," App. 10a-11a, as the only place these "requests" had been made was in the district court brief. It went on to hold, on this issue, that "in the FSIA context, 'discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.' *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir.1998) (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992))," and that "[b]ecause the record makes clear that the FRBNY Funds were never an attachable asset of the Republic and that § 1610's commercial activity exception to immunity from attachment does not apply, . . . [t]here is no indication on this record that the District Court improperly calibrated the delicate balancing between permitting discovery to substantiate exceptions to statutory foreign

sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." App. 39a-40a (quotation marks and citations omitted).

ARGUMENT

PETITIONERS DID NOT SERVE DISCOVERY DEMANDS IN THE DISTRICT COURT AND THERE IS NO CIRCUIT SPLIT OR OTHER BASIS THAT WARRANTS REVIEW OF THE COURT OF APPEALS' DISCRETIONARY DISCOVERY RULING

BCRA's separate brief demonstrates why EM and NML's attempt to attach BCRA's reserves at the FRBNY to satisfy their claims against the Republic was in violation of the FSIA and long-established caselaw. BCRA Br. at 11-28. No discovery was necessary for the district court and the court of appeals to reach this legal conclusion, which is fully supported by the plain language of the Decrees. *See* App. 21a ("Plaintiffs' arguments concerning ownership of, and control over, the FRBNY Funds are not supported by the Decrees. . . . [T]he Decrees . . . did not cause control of BCRA's assets to change from BCRA to the Republic.").

Having mistakenly relied on the Decrees as sufficient to make their case for the attachment of BCRA's reserves, EM and NML now invoke due process concerns arising from the Second Circuit's purported "denial of all discovery." Pet. 9; *see also id.* at 25 (characterizing decision below as "holding that petitioners were entitled to *no discovery at all*") (emphasis in original), 26 (court of appeals

"denied not only full discovery but *all discovery*") (emphasis in original). Petitioners' hyperbole seriously mischaracterizes the actual course of events, which shows that their assertion that they "were not permitted to develop" the record below, Pet. 9, is wholly misplaced.

EM claims that it sought certain evidence "in discovery," Pet. 25, and the Petition also repeats the mantra that EM and NML did not receive discovery to which they were "entitled," implying that they actually sought discovery in connection with their application and that this discovery was erroneously denied. *Id.* at 2 (claiming Second Circuit held "that petitioners were not entitled to discovery to show that [the attached funds were property of the Republic]"), 9 ("[T]he court of appeals held that petitioners were not entitled to limited discovery to fill [alleged gaps in the record]."), 10, 25, 26, 27, 28, 30. In fact, neither EM nor NML formulated or served so much as a single interrogatory or document request concerning the Decrees. To the contrary, EM explicitly disavowed any need for discovery, stating to the district court that "we don't think discovery is needed in order to confirm the attachments." App. 62a. Indeed, because EM did not and could not cite "any part of the record demonstrating that [specific discovery] requests were made to the District Court," while the district court transcript showed that its counsel had assured the court that EM should prevail without discovery, the court of appeals was left to "assume *arguendo* that, as represented by EM, these requests were made." App. 10a-11a n.5. This is hardly a record on which petitioners can expect this Court to act as a magistrate judge to decide discovery matters that were never pursued, much less treat the lower

courts' rulings as raising a "due process" issue of constitutional dimensions.[4]

Even if EM had properly requested the discovery that the court of appeals assumed *arguendo* that it did, rather than at best alluding to it in passing in its district court brief, this discovery would have been properly denied. Petitioners seem wholly to disregard the fact that the scope of appellate review of discovery rulings is abuse of discretion, *see Simmons v. United States*, 390 U.S. 377, 387-88 (1968), which no doubt accounts for the paucity of discovery disputes that ever make their way to this Court on certiorari. Where such disputes are worthy of review, it is because they implicate major concerns or issues of law. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 513 (1947) (attorney work product privileged from discovery; problem raised by case had caused "wide-spread controversy among the members of the legal profession"). Here, no such error can plausibly be claimed, since the court of appeals' ruling was fully consistent with FSIA law regarding the scope of discovery relating to foreign states.

Under the FSIA, the only property against which petitioners may execute their judgments is property of the Republic that is in the United States and used for a com-

---

[4] The absence of specific discovery requests by either EM or NML of course distinguishes this case from several of the lower court cases cited by petitioners. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 50 (2d Cir. 2002) (subpoena duces tecum); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 174 (2d Cir. 1998) (interrogatories, document requests, and subpoena); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1472 (9th Cir. 1992) (discovery requests and interrogatories); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448 (6th Cir. 1988) (motion to compel discovery).

mercial activity in the United States. 28 U.S.C. §§ 1609, 1610(a). Section 1610(a)'s substantive limits on execution are in turn the touchstone for determining the relevance of any request for discovery in the post-judgment context. It is well settled in the lower courts that sovereign immunity protects a foreign state from the attendant burdens of litigation, including the burdens of discovery. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir.) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation."), *cert. denied*, 531 U.S. 979 (2000); *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). Where discovery is permitted under the FSIA, comity concerns "require a delicate balancing 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery.'" *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) ("*Rafidain I*") (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.), *cert. denied*, 506 U.S. 956 (1992)); *see also First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 54 (2d Cir.) ("*Rafidain II*") (advising that "courts should proceed with care in pursuing the assets of foreign governments and their instrumentalities"), *cert. denied*, 537 U.S. 813 (2002).

In view of these comity considerations, the Second Circuit, like its sister circuits, has made it clear that discovery against sovereigns must be "'ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.'" App. 39a (quoting *Rafidain I*, 150 F.3d at 176); *accord Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007); *Conn.*

Bank, 309 F.3d at 260 n.10. Plaintiffs therefore are not entitled to discovery that is not designed to verify specific facts alleged to establish an exception to immunity under the FSIA. *Kelly*, 213 F.3d at 852 (plaintiffs not entitled to discovery where they had failed "to allege specific facts crucial to immunity which demonstrated a need for discovery").

EM and NML grudgingly accept these limitations on jurisdictional discovery, but argue that no limits apply once a court's jurisdiction over a foreign state is established. *See* Pet. 9, 26. This argument, although petitioners elide the point, would of course not apply to BCRA, over which jurisdiction was never established, and could not be established given the language of the Decrees. *See* App. 40a. And although the district court does have jurisdiction over the Republic, the courts of appeals have uniformly applied the same standards for jurisdictional discovery against a foreign state to post-judgment discovery proceedings. *See Af-Cap*, 475 F.3d at 1096 (post-judgment); *Conn. Bank*, 309 F.3d at 260 n.10 (post-judgment). If anything, the limits are more stringent in the post-judgment context, because the FSIA—even when the foreign state waives immunity—provides for *narrower* exceptions to immunity to execution than to jurisdiction. *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626 (Congress intended §§ 1610(a) and (b) to only "*partially* lower[] the barrier of immunity from execution," in a similar manner to, but to a lesser extent than, exceptions to immunity from jurisdiction) (emphasis added); *see also De Letelier*, 748 F.2d at 799 ("[S]ince it was not Congress' purpose to lift execution immunity wholly and completely, a right without a remedy does exist in [certain] circumstances."). Thus, discovery in aid of execution follows the

statute's substantive limitations on execution, and is limited to verifying the immunity of specific property whose amenability to execution has been drawn into genuine dispute.

There is no rule "[a]llowing 'full' post-judgment discovery against a sovereign debtor," much less a presumptively separate instrumentality such as BCRA that is not a party to the suit. Pet. 26 (quoting *Rafidain I* and *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992)).[5] The *Rafidain I* court did permit a plaintiff "to conduct full discovery against Rafidain," which was an instrumentality of the Republic of Iraq and also a judgment debtor, but this discovery was addressed to determining whether the district court had jurisdiction over another instrumentality of the Republic of Iraq that was allegedly Rafidain's alter ego. 150 F.3d at 177. Accordingly, *Rafidain I* is a jurisdictional immunity case that does not speak to the scope of a foreign state's immunity from asset discovery. Indeed, in a subsequent case, *Rafidain II*, the Second Circuit made clear that a foreign state's submission to post-judgment discovery "procedures and legal responsibilities associated with" its submission to jurisdiction exists "to the extent those procedures and responsibilities

---

[5] EM and NML try to concoct a "circuit split" on the question whether "post-judgment creditors are in fact entitled to a full complement of discovery," Pet. 25-26, but all but one of the cases that they cite concern jurisdictional discovery or are completely inapposite. *E.g.*, *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (jurisdictional discovery). The exception is *Connecticut Bank*, where the discovery sought went directly to a central fact necessary to the immunity inquiry: whether the property at issue was used for commercial activity in the United States. *See* 309 F.3d at 251.

are related to its commercial activity in the United States." 281 F.3d at 53-54.

Richmark, upon which petitioners also rely, principally concerned a district court's imposition of sanctions when an instrumentality failed to comply with court-ordered discovery. 959 F.2d at 1471. The Ninth Circuit referred in passing to the fact that this discovery related to the instrumentality's assets located abroad, *id.* at 1471, 1478, but did not establish any rule that a court may order discovery against a foreign sovereign without regard to the limits of the FSIA, or discovery seeking information about property that is immune from execution under the FSIA. Fifteen years after *Richmark*, the Ninth Circuit agreed with the Fifth (and Second) Circuits that "discovery against a foreign sovereign should be ordered circumspectly and only to verify allegations of specific facts crucial to the immunity determination," *Af-Cap*, 475 F.3d at 1096 (quotation marks and citation omitted), effectively abrogating the *Richmark* court's dictum concerning a judgment creditor's "need[]" for discovery outside the limits of the FSIA.

EM's purported discovery requests concerned BCRA's reserves, which petitioners conceded would not be subject to execution unless the Decrees converted them from property of BCRA held for its own account into property of the Republic. App. 10a n.5, 18a. Once the district court and the court of appeals decided this legal question in favor of the Republic and BCRA, there were no "specific facts crucial to an immunity determination" that had to be verified. *Rafidain I*, 150 F.3d at 176; *cf. Phoenix Consulting*, 216 F.3d at 40 (discovery against sovereign defendant "should not be authorized at all if the defendant raises" different issue whose resolution "would impose a lesser burden

upon the defendant"). Rather, the discovery purportedly sought by EM explicitly called for confidential and sensitive information about, *inter alia*, the purposes of BCRA's reserves at the FRBNY and the Republic's plans for BCRA's reserves elsewhere, App. 10a n.5, which would go far beyond the appropriate limits of the FSIA and be offensive to any sovereign state. The court of appeals correctly recognized that EM and NML were not "entitled" to receive this information or to make the Republic and BCRA incur any additional "costs, in time and expense, and other disruptions attendant to litigation" concerning the reserves. *Kelly*, 213 F.3d at 849.

Finally, the Republic notes that under the district court's management of the bondholder cases against the Republic, EM and NML have already received more asset discovery than they are "entitled" to receive. The Republic has answered interrogatories concerning the identities of its agencies or instrumentalities engaged in commercial activity both inside and outside the United States, even though these entities are presumptively not liable for the Republic's debts under *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). *See id.* at 629. BCRA also voluntarily provided a declaration concerning its reserves in March 2005, more than nine months before EM and NML obtained *ex parte* attachment and restraining orders freezing BCRA's reserves at the FRBNY. Neither EM nor NML contested this discovery or sought any additional discovery before seizing the reserves. There was no violation of due process when the court of appeals rejected petitioners' claimed entitlement to discovery that was not necessary to decide the immunity of the reserves, and there is no reason whatever for this

Court to revisit the court of appeals' discretionary affirmance of the district court's not granting petitioners discovery that they never properly pursued before it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EM LTD. and NML CAPITAL, LTD.,

Petitioners,

—v.—

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPÚBLICA ARGENTINA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION OF RESPONDENT BANCO CENTRAL DE LA REPÚBLICA ARGENTINA TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether two Argentine "Decrees" allowing Argentina's central bank to use "unrestricted reserves" for a payment to the International Monetary Fund ("IMF"), without specifying or ordering which assets would be so used, constituted an "appropriation" by the Republic of Argentina of reserves held by the central bank in an account in its own name at the Federal Reserve Bank of New York so as to subject the reserves to attachment or execution by the Republic's creditors.

(2) Only if the Court reverses the Second Circuit's determination that there was no "appropriation" as a matter of New York and Argentine law would additional questions under the Section 1610 of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1610, be presented:

> (a) Whether the Second Circuit correctly held that proof of a "potential" use of property, without more, is insufficient to come within the exception to immunity for attachment or execution for sovereign property "used for" commercial activity in the United States under Section 1610.
>
> (b) Whether the Second Circuit correctly held that making a payment to the IMF is sovereign or governmental in nature, thus beyond the exception to immunity from attachment or execution for sovereign property used for "a commercial activity in the United States" under Section 1610.

(3) Whether a foreign sovereign's reserves in the United States that were otherwise used for central banking functions and immune from attachment or execution under the central bank/monetary authority exemption of the FSIA, 28 U.S.C. § 1611(b)(1), lost their immunity when the Argentine Decrees made those reserves more readily usable for a payment to the IMF.

(4) Whether the Second Circuit erred in affirming the district court's discretionary holding that petitioners were not entitled to any other discovery of respondent Banco Central de la República Argentina ("BCRA") -- a foreign sovereign entity presumed immune from jurisdiction and attachment under the FSIA -- because petitioners "failed to show a reasonable basis for assuming jurisdiction over BCRA."

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STATUTES AND RULES INVOLVED

In addition to the provisions included in the petition, the following statutes and rules are relevant in this proceeding:

28 U.S.C. § 1605(a) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

N.Y. C.P.L.R. 5201(b) provides:

> (b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

N.Y. C.P.L.R. 6202(b) provides in relevant part: "Any debt or property against which a money judgment may

be enforced as provided in section 5201 is subject to attachment."

Federal Reserve Regulation J, 12 C.F.R. § 210.25 and Appendix B provide in relevant part:

> (b) *Scope.* (1) This subpart incorporates the provisions of Article 4A set forth in appendix B to this subpart. * * *
>
> (2) Except as otherwise provided in paragraphs (b)(3) and (b)(4) of this section, this Subpart governs the rights and obligations of:
>
> (i) Federal Reserve Banks sending or receiving payment orders;
>
> (ii) Senders that send payment orders directly to a Federal Reserve Bank;
>
> (iii) Receiving banks that receive payment orders directly from a Federal Reserve Bank;
>
> (iv) Beneficiaries that receive payment for payment orders sent to a Federal Reserve Bank by means of credit to an account maintained or used at a Federal Reserve Bank; and
>
> (v) Other parties to a funds transfer any part of which is carried out through Fedwire to the same extent as if this subpart were considered a funds-transfer system rule under Article 4A.
>
> * * *

APPENDIX B TO SUBPART B OF PART 210--ARTICLE 4A, FUNDS TRANSFERS

Section 4A-103. *Payment Order--Definitions*

(a) In this Article:

* * *

(2) *Beneficiary* means the person to be paid by the beneficiary's bank.

(3) *Beneficiary's bank* means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) *Receiving bank* means the bank to which the sender's instruction is addressed.

(5) *Sender* means the person giving the instruction to the receiving bank.

* * *

Section 4A-104. Funds Transfer--Definitions

In this Article:

* * *

(b) *Intermediary bank* means a receiving bank other than the originator's bank or the beneficiary's bank.

(c) *Originator* means the sender of the first payment order in a funds transfer.

(d) *Originator's bank* means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

* * *

Section 4A-503. Injunction or Restraining Order with Respect to Funds Transfer

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

Excerpts from BCRA's Charter, Law 24,144 and from the Argentine Convertibility Law, Law 23,928, are reprinted at pages 7a -9a of Respondent's Appendix *infra*.

STATEMENT OF THE CASE

Petitioners -- two venturesome hedge funds -- seek to have this Court review the judgment of a panel of the Court of Appeals for the Second Circuit (Winter, J.; Cabranes, J.; Pooler, J.) affirming the vacatur of *ex parte* orders of attachment and restraining notices (the "Restraints") obtained to enforce judgments and would-be judgments against the sovereign Republic of Argentina (the "Republic" or "Argentina").

The opinions below properly found that petitioners were, in essence, barking up the wrong tree, because the Restraints were not issued against property of the Republic. Rather, the Restraints were issued against more than $100 million (the "Funds") in an account maintained by Banco Central de la República Argentina ("BCRA"), the Republic's central bank, at the Federal Reserve Bank of New York (the "FRBNY").* BCRA is not an obligor on the underlying bonds, and is not a party to the underlying dispute between the Republic and its creditors. The courts below made the dispositive factual and legal determination that the FRBNY Funds had always been, and remained, BCRA's property. In particular, the opinions below rejected petitioners' argument that two decrees issued on December 15, 2005 by Argentina's President (the

---

* BCRA was designated an "interested non-party" in the courts below. Nevertheless, the court of appeals treated BCRA as an appellee in all respects, and BCRA is properly before this Court as a respondent. BCRA had and continues to have an interest in the decision on the petition equivalent to that of a respondent: BCRA contends, and petitioners contest, that the property that is the subject of the petition is BCRA's property and immune from attachment. Petitioners have consented to BCRA filing this brief as a respondent. Petition for a Writ of Certiorari ("Pet." or the "petition") at ii.

"Decrees") converted the FRBNY Funds into an attachable interest of the Republic. The Decrees permitted BCRA to use certain of its reserves to repay the Republic's debt to the International Monetary Fund ("IMF"), a multilateral lending agency. This is a fact-based determination of no significance beyond this case.

Although the determination that the FRBNY Funds remained BCRA's property at all relevant times was a sufficient ground to invalidate the Restraints, the courts below went on to hold that the FRBNY Funds would have been immune from attachment even if the FRBNY Funds were found to be the Republic's property. The courts held that the FRBNY Funds were not "used for a commercial activity in the United States" under the exception to immunity from attachment in aid of execution and pre-judgment attachment set forth, respectively, in § 1610(a) and § 1610(d) of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. § 1610(a) and (d) (the "commercial-activity exception"), because (1) the FRBNY Funds were not actually used nor designated for use to repay the IMF debt, and (2) the repayment of IMF debt itself was not "commercial activity." Contrary to petitioners' claims of multiple "circuit conflicts," the Second Circuit explicitly followed the interpretation of the commercial-activity exception adopted by its sister circuits, including the Fifth Circuit, in reaching this conclusion.

The result below is further supported by the FSIA's express exemption from attachment or execution for property "of a foreign central bank or monetary authority held for its own account," 28 U.S.C. § 1611(b)(1) (the "central bank/monetary authority exemption"). While the Second Circuit ultimately did not rest its holding on this provision, the court noted that "there is little support for plaintiffs' [now petitioners'] arguments" that the Decrees removed the reserves from the protection of the exemption. Appendix to Pet. ("Pet. App.") 38a n.22. The central

bank/monetary authority exemption provides a separate and independent basis for vacating the Restraints, further making this case an inappropriate one for this Court's attention.[1]

Finally, petitioners seek review of the denial of discovery prior to the vacatur of the Restraints. Petitioners never served any discovery, however, and never raised any factual issues sufficient to overcome the presumptive immunity from discovery enjoyed by a nonparty sovereign instrumentality. As the court of appeals held, that discovery decision is properly the subject of the district court's discretion. It certainly is not one this Court should review.

A. Prior to the December 15, 2005 Decrees, the FRBNY Funds Were Concededly Owned by BCRA and Immune from Attachment.

BCRA is "a self-administered institution" created by Argentine law as a juridical entity separate and independent from the Republic's Executive Branch under a clause of the Argentine Constitution providing for the establishment of "a Federal bank with power to issue money." Const. Arg. art. 75 ¶6. *See also* Respondent Appendix ("Resp. App.") 7a (BCRA Charter). BCRA is managed by a board of directors appointed by the President of the Republic "in agreement with" the Senate. The board delegates oversight of BCRA's day-to-day activities to deputy managers. BCRA's core function is setting and executing monetary policy for the Republic.

As the FRBNY stated in a declaration submitted in support of BCRA in the trial court, many countries, attracted by "the safety and stability of the dollar and the United

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[1] "A respondent is entitled . . . to defend the judgment on any ground supported by the record." *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997).

States' financial, political and judicial systems, . . . maintain part of their cash reserves in dollar-denominated assets in the United States" held in accounts "owned and controlled by the country's central bank." Resp. App. 25a-26a. BCRA has long maintained a portion of Argentina's reserves in BCRA's account at the FRBNY. There is no dispute that, prior to the Decrees, BCRA's reserves at the FRBNY were not subject to attachment to satisfy debts of the Republic. Indeed, as the court of appeals observed, petitioners conceded below that: "(1) before December 15, 2005 . . . the FRBNY Funds were the property of BCRA; (2) [petitioners] had no right to attach the FRBNY Funds before that date; and (3) even after issuance of the Decrees, the FRBNY Funds were held in BCRA's name." Pet. App. 18a.

B. Countries Commonly Repay Debts to the IMF with Central Bank Reserves.

As the court of appeals found, "central banks regularly execute transactions with the IMF on behalf of their parent governments," and "the vast majority of [IMF] members designate their respective central banks" as fiscal agent for IMF transactions. Pet. App. 38a n.22.[2] BCRA is

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[2] As of April 30, 2001, of 183 member countries of the IMF, 142, including Argentina, had designated their central bank as fiscal agent for purposes of dealing with the IMF. Treasurer's Department, International Monetary Fund, Pamphlet No. 45, *Financial Organization and Operations of the IMF* 84, 86 (6th ed. 2001); *see also* Derek Asiedu-Akrofi, *Central Bank Immunity and the Inadequacy of the Restrictive Immunity Approach*, 28 Can. Y.B. Int'l L. 264, 266 (1990) ("Despite the varying conditions under which central banks operate, most central banks perform similar functions. These functions include . . . acting as fiscal agents of member countries of the International Monetary Fund.").

among these countries. Under its Charter, BCRA is authorized to act "as a financial agent . . . , and as depository and agent for the [Republic] before international monetary, banking and financial entities, of which the Nation is a member." Resp. App. 8a; *see also id.* (authorizing BCRA to engage in "payment transactions derived from international agreements and borrow[ing] loans from foreign multilateral agencies and foreign instrumentalities, central banks or such entities of which the BCRA may solely be a borrower, on its behalf or on behalf of the National Treasury as the Argentine Republic's Financial Agent"). In its role as "financial agent" of the Republic, BCRA has been, at all relevant times, the entity through which the Republic borrows money from, and repays debt to, the IMF. Resp. App. 2a-3a.

C. The December 15, 2005 Decrees Merely Lifted Argentine Law Constraints that Had Limited BCRA's Ability to Use Its Reserves to Repay Argentina's IMF Financing.

Petitioners cast the Decrees as having "diverted" the FRBNY Funds from BCRA to the Republic. But BCRA always had used its reserves to pay principal and interest on Argentina's borrowings from the IMF. Resp. App. 3a. The Decrees lifted Argentine law provisions that had restricted BCRA's ability to use reserves to repay the Republic's debt to international lending authorities such as the IMF.

Under a law passed in January 2002, at the height of Argentina's fiscal crisis, all BCRA reserves had to be used to back the monetary base.[3] Resp. App. 4a, 9a, 15a. This meant that whenever BCRA used reserves to make a repayment to the IMF, the Republic was contemporaneously

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[3] The "monetary base" consists of the total amount of Argentine currency in circulation plus certain amounts deposited by financial entities in the central bank. Resp. App. 4a, 9a.

required to reimburse BCRA in an equivalent amount of Argentine pesos. *Id.* at 4a.

The first of the Decrees, Decree of Necessity and Urgency No. 1599/05, authorized BCRA to use reserves in excess of 100 percent of the monetary base (the "Unrestricted Reserves") to satisfy obligations to "international financial bodies." Pet. App. 131a-132a (Decree 1599/05, arts. 5, 6). Later that day, the Executive Branch issued Decree No. 1601/05, which authorized the Ministry of Economy and Production to direct BCRA to repay the full outstanding IMF debt, using an unspecified portion of the Unrestricted Reserves. Pet. App. 136a-138a. As BCRA's Argentine-law expert stated, "[t]hese modifications were simply designed to give the BCRA greater flexibility in the use of the reserves owned by it." Resp. App. 16a. Instead of reimbursing BCRA with pesos, the Republic provided BCRA with a 10-year interest-bearing non-transferable note to offset the reserves that would be used to repay the Republic's debt to the IMF. Pet. App. 145a (Resolution 49, art. 3).[4]

The next day -- prior to the service on BCRA of the Restraints and without notice of any attempt by petitioners to restrain BCRA's reserves in New York -- Pedro H. Rabasa, BCRA's Senior Manager of Foreign Exchange Reserves, supervised the transmission of orders to transfer funds from various BCRA accounts located outside New York. Resp. App. 12a. The payments to the IMF were made on January 3, 2006. *Id.* at 3a.

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[4] Petitioners argue that the issuance of this note shows that the payment to the IMF was not a use of funds for central banking purposes. Pet. 15. That is untrue. The Republic had always reimbursed its central bank for repayments of IMF lending, Resp. App. 3a, and petitioners concede that BCRA's reserves were not previously subject to attachment.

D. The Proceedings Below.

On Friday, December 30, 2005, petitioners obtained the *ex parte* Restraints based on a declaration that asserted -- falsely -- that the Decrees constituted an "appropriation" by the Republic of BCRA's reserves. Service of the Restraints on the FRBNY resulted in the temporary attachment of the approximately $105 million in reserves on deposit in BCRA's account at the FRBNY. On January 6, 2006, BCRA moved to vacate the Restraints.

On January 12, 2006, the district court (Griesa, J.) vacated the Restraints, concluding that (1) the Decrees did not create a "change in the property right situation" that would render BCRA's reserves attachable under New York law, Pet. App. 108a; (2) the payment to the IMF was governmental in nature and not subject to the FSIA's commercial-activity exception in any event, even if the Decrees had transferred BCRA reserves to the Republic, *id.*; and (3) the $105 million in the FRBNY account "was, is, and continues to be the property of the central bank used for central banking functions, and thus . . . the prohibition of Section 1611 on attaching those funds must apply." *Id.* at 109a. The court entered a formal order on January 24, 2006, but stayed the effect of that order pending an expedited appeal to the Second Circuit.

On appeal, the United States and the FRBNY each submitted briefs as *amici* in support of BCRA and the Republic. Pet. App. 14a. The United States in its brief and at oral argument argued, *inter alia*, that BCRA's repayment of IMF financing was not "commercial activity" within the meaning of Section 1610 of the FSIA because in receiving and discharging IMF lending Argentina "exercise[ed] powers only available to a sovereign and not any private player in the marketplace." The United States also argued that the Restraints, if permitted to stand, "would contravene important interests of the United States -- both in protecting the catalytic role of the . . . IMF . . . in the world financial

system, and in protecting the preeminence of the U.S. dollar as a reserve currency." The FRBNY argued that BCRA's account at the FRBNY was also exempt from attachment under Section 1611 as property "held for [BCRA's] own account." The FRBNY cited, *inter alia*, Federal Reserve Regulation J and Article 4A of the Uniform Commercial Code, pursuant to which, the FRBNY said, "the Republic has no attachable property interest in . . . BCRA's account at FRBNY."

On January 5, 2007, the Second Circuit affirmed the district court's vacatur order. In an opinion by Judge José A. Cabranes, the panel unanimously held that the Decrees transferred neither ownership nor control of the FRBNY Funds to the Republic. "[T]he FRBNY Funds continue to be owned by BCRA, a separate juridical entity from the Republic, and are not available to satisfy a judgment against the Republic." Pet. App. 4a. The Court noted that "[t]o conclude otherwise would be to allow creditors of a foreign state to attach all of the assets of the state's central bank any time the foreign state issues directives affecting the central bank's reserves." Pet. App. 21a.

The panel held in the alternative that "even if the funds were considered an attachable asset of the Republic," the commercial-activity exception would not permit attachment of the FRBNY Funds because (i) a "government's repayment of its debt to the IMF is not a 'commercial activity,'" and (ii) the FRBNY Funds were not "used for" repaying the IMF. *Id.* at 4a. The Second Circuit declined to reach the central bank/monetary authority exemption, but observed that "there is little support for plaintiffs' arguments" on this issue. *Id.* at 38a n.22. The court noted that "central banks regularly execute transactions with the IMF on behalf of their parent governments" and "the vast majority of [IMF] members designate their respective central banks" as fiscal agent for IMF transactions, which "would support the conclusion that even

if BCRA had decided to use the FRBNY Funds to repay the IMF, the funds would continue to be held for BCRA's 'own account.'" *Id.*

Finally, while noting that petitioners had not pointed to any formal requests for discovery, the panel found no abuse of discretion in Judge Griesa's refusal to grant petitioner EM Ltd.'s informal discovery request. *Id.* at 40a.

On January 19, 2007, petitioners asked the court of appeals for a rehearing and rehearing en banc. The panel denied the rehearing the request, and no active judge requested a vote on whether to rehear the panel's decision en banc. Pet. App. 114a, 116a, 118a.

REASONS FOR DENYING THE PETITION

The court of appeals' decision rests on three alternative holdings, all three of which must be subject to reversal and worthy of this Court's attention to merit a grant of certiorari that will have practical significance. *First*, in order to prevail, petitioners must demonstrate that the Decrees effected a transfer of ownership of the FRBNY Funds under Argentine and New York law; *second*, under 28 U.S.C. § 1610(a) and (d), if the Republic does in fact hold an attachable interest in the FRBNY Funds, petitioners must prove that *potential*, not actual, use of the FRBNY Funds to repay the IMF could satisfy the "used for" requirement of the commercial-activity exception; and *third*, even if mere potential use is sufficient, petitioners must show that the international treaty obligation to repay the IMF is a commercial activity within the meaning of § 1610(a) and (d). The Second Circuit correctly resolved each of these questions, and none provides a basis for certiorari.

The threshold issue to be resolved here is the meaning -- under Argentine law -- of two Argentine Decrees. The district court looked closely at the language of each of the Decrees, *see* Pet. App. 51a-69a, and the Second Circuit affirmed its conclusion that "the title [of the reserves]

should be regarded as not changed," *id.* at 108a. The fact that, in order to reach any of the other of the petitioners' proposed questions under the FSIA, the Court would have to decide an issue that is ultimately a matter of Argentine law is in itself reason to deny the petition.

Even if there had been a transfer in ownership of the FRBNY Funds, the Second Circuit's conclusion that these assets were not "used for" a commercial activity because they were not used, or designated for use, for the claimed activity, was a fact-bound determination decided under standards on which, contrary to petitioners' contention, there is no conflict among the lower courts.

Likewise, the question whether payment to the IMF pursuant to treaty constitutes a "commercial activity" is one on which no other circuit court has had an opportunity to opine and on which there is no circuit split. The Second Circuit applied the test set forth in this Court's opinion in *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), and petitioners agree that that test applies. Petitioners dispute only the application of the test to a particular set of facts.

Moreover, that question is ultimately of no moment, because the record clearly shows that a payment to the IMF is a traditional central banking function, so that the reserves are protected in any event by the central bank/monetary authority exemption under § 1611(b)(1) of the FSIA. Although the court below did not reach this issue, it is an argument properly raised by respondents that provides yet another basis for denying the petition.

Finally, the Court should not spend its scarce resources to review petitioners' discovery request, which is based on an inadequate record in any event. The trial court's discovery ruling is a discretionary, fact-bound application of well-settled principles.

I. The Petition Should Be Denied Because the Second Circuit Properly Concluded, as a Matter of New York State and Argentine Law, that Two Argentine Decrees Did Not Transfer Property Rights in BCRA's Reserves, a Question that Is Entirely Fact-bound.

The threshold issue in this case is whether the Decrees transferred the FRBNY Funds, which prior to December 15, 2005 concededly were BCRA's property, to the Republic. If that question is answered in the negative, as the courts below held, this Court would never reach petitioners' arguments regarding the application of the FSIA's commercial-activity exception, which depend on petitioners first showing that the Republic had an attachable interest in the FRBNY Funds.

Supreme Court Rule 10 states, "a petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no compelling reason to review the Second Circuit's ruling that, as a matter of New York and Argentine law, the Decrees neither transferred ownership of the FRBNY Funds to the Republic nor made the FRBNY Funds an attachable interest of the Republic. In any event, that ruling was clearly correct, and petitioners do not now, and did not below, point to *any* legal authority supporting a contrary conclusion.

A. The Decrees Did Not, Under Argentine Law, Transfer Any Ownership Interests in the FRBNY Funds.

Petitioners have never seriously contended that the language of the Decrees evidences a transfer of ownership rights in the reserves to the Republic. BCRA submitted a declaration by Gustavo Gerscovich, an Argentine law professor and former legal manager at the central bank.

Professor Gerscovich opined that nothing in the Decrees or any other Argentine law "indicates . . . that the BCRA's ownership of its reserves is altered in any way." Resp. App. 16a. Petitioners presented no contrary opinion of Argentine law.[5] Thus, the courts below found that, as a matter of Argentine law, the Decrees did not transfer foreign reserves held by BCRA, including those held in the FRBNY account, to the Republic. Pet. App. 18a-19a ("Plaintiffs do not . . . point to any order or other document explicitly transferring ownership of the FRBNY Funds from BCRA to the Republic."). The petition does not dispute that finding.

B. Under New York Property and Banking Law, the Funds in the FRBNY Account Belong to BCRA.

Petitioners also do not articulate a coherent theory for how the Decrees effected a transfer of an attachable ownership interest in the FRBNY Funds under New York law.[6] Under New York Civil Practice Law and Rules ("C.P.L.R.") 5201(b), "[a] money judgment may be enforced against any property which could be assigned or transferred." *See also* C.P.L.R. 6202 (only "property against which a money judgment may be enforced as provided in

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[5] Petitioners submitted a declaration of an Argentine lawyer that merely recited the history of the Decrees and explained the term "freely available reserves." The declaration said nothing about the effect of the Decrees on the ownership or control of the FRBNY Funds. Resp. App. 17a-21a.

[6] Federal Rule of Civil Procedure 69 incorporates New York state law. "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice of the state in which the district court is held . . . ." Fed. R. Civ. P. 69. Federal Rule of Civil Procedure 64 similarly incorporates New York state law regarding pre-judgment attachment.

section 5201 is subject to attachment"). "[A] party cannot reach assets in which the judgment debtor has no interest." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F. 3d 70, 83 (2d Cir. 2002). "A determination of [the Republic's] property interest in the disputed funds -- *i.e.*, whether [the Republic] can 'assign or transfer' any of these funds -- is therefore dispositive . . . ." *Id.*

The court of appeals held that "[w]hile the Decrees may have manifested the Republic's ability and willingness to control BCRA, and to direct BCRA to use its assets for the benefit of the Republic," the Decrees left to BCRA's discretion "the decision of which specific funds would be used." Pet. App. 21a. As a consequence, the Decrees "did not cause control of BCRA's assets to change from BCRA to the Republic." *Id.*

That holding, which applies Argentine and New York law to a particular factual setting, stands on three independent grounds.

First, after the Decrees were issued, the FRBNY Funds remained in an account in BCRA's own name, which gives rise to a presumption of ownership under New York law. *See Karaha Bodas*, 313 F. 3d at 86 ("Under New York law, the party who possesses property is presumed to be the party who owns it. When a party holds funds in a bank account, possession is established, and the presumption of ownership follows."); *see also Perkins* v. *Guaranty Trust Co. of New York*, 274 N.Y. 250, 261, 8 N.E.2d 849, 853 (1937) (possession of stock certificates in holder's own name created presumption of ownership); *In re Kolodziejczyk* v. *Wing*, 261 A.D.2d 927, 928, 689 N.Y.S.2d 825, 825 (1999) (bank account statement listing joint owners created presumption of joint ownership); *Pollock* v. *Rapid Indus. Plastics Co.*, 113 A.D.2d 520, 525, 497 N.Y.S.2d 45, 49 (1985). Petitioners offered no authority to overcome the

presumption that BCRA owns the assets held in a New York bank account in BCRA's name.

Second, under fundamental banking law principles, a depositor of a bank has no right to assign or transfer the bank's property held at another bank. A positive balance in a bank account reflects "a promise to pay, from the bank [here, FRBNY], to the depositor [BCRA]." *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16, 21 (1995). As the FRBNY Funds are held solely in BCRA's name, the FRBNY owes a debt with respect to those funds only to BCRA. *See Dakin* v. *Bayly*, 290 U.S. 143, 146 (1933) (deposit of funds creates a debtor-creditor relationship between bank and its customer). Thus, a BCRA depositor, such as the Republic, cannot assign or direct the transfer of BCRA's account at the FRBNY. The FRBNY could only pay out on the instructions of BCRA, not the Republic. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Chemical Bank*, 57 N.Y.2d 439, 444, 442 N.E.2d 1253, 1256 (N.Y. 1982) (implicit in the bank-customer relationship is "the understanding that the bank will pay out its customer's funds only in accordance with the latter's instructions"); *Bradford* v. *Chase Nat'l Bank of City of New York*, 24 F. Supp. 28, 38 (S.D.N.Y. 1938) ("[T]he person in whose name the account stands has absolute control of it."), *aff'd sub nom. Berger* v. *Chase Nat'l Bank of City of New York*, 105 F.2d 1001 (2d Cir. 1939), *aff'd*, 309 U.S. 632 (1940).

Third, even if BCRA, pursuant to a directive from the Republic, had in fact ordered the FRBNY to transfer some or all of the FRBNY Funds to the IMF -- which it did not do -- petitioners still could not have attached the funds by levying on the FRBNY. Such a transfer would have to be made via the Fedwire, and under Federal Reserve Regulation J, 12 C.F.R. § 210.25, and Article 4A of the Uniform Commercial Code ("U.C.C.") incorporated by reference into Regulation J, a creditor of the originator of a Fedwire funds transfer -- here, the Republic -- may not

attach or restrain funds in the hands of a beneficiary's bank or intermediary bank -- here, FRBNY -- in order to collect a debt owed by the originator. U.C.C. 4A-103, 104. Such a creditor may only serve such a restraint on BCRA (the originator's bank), U.C.C. 4A-503, which in this case is located in Argentina.[7] In other words, an order by a depositor to its bank to pay a third party does not, as a matter of New York and federal banking law, turn the bank's funds into the depositor's and make them available for attachment by the depositor's creditors. As the Official Commentary to the U.C.C. explains, creditors of an originator of a payment order cannot reach an account at an intermediary or receiving bank such as, here, the FRBNY, because "no property of the originator is being transferred." U.C.C. 4A-502 cmt. 4.

Furthermore, the Second Circuit's conclusion that the Decrees did not effect a transfer of property rights to BCRA's depositor, the Republic, is supported by sound policy. As that court held, petitioners' argument would "allow creditors of a foreign state to attach all of the assets of the state's central bank any time the foreign state issues directives affecting the central bank's reserves." Pet. App. 21a. National governments typically retain the ability to direct their central banks to act with respect to foreign exchange reserves. M.H. de Kock, *Central Banking* 34-37, 312-18 (4th ed. 1974). As the Second Circuit further observed, Pet. App. 21a n.12, the United States has repeatedly directed the Federal Reserve Banks to transfer

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[7] A New York court's attachment order reaches only those assets located in New York. *See In re Nat'l Union Fire Ins. Co of Pittsburgh, Pa.* v. *Advanced Employment Concepts, Inc.*, 269 A.D.2d 101, 101, 703 N.Y.S.2d 3, 4 (2000) ("In order to be subject to attachment, property must be within the court's jurisdiction.").

"surplus funds . . . to the Secretary of the Treasury for deposit in the general fund of the Treasury." 12 U.S.C. § 289(b)(1).

Petitioners respond that this concern was exaggerated, because their argument is limited to a directive "to *repay a nation's external debt.*" Pet. 13 (emphasis in original). Petitioners also assert that their theory would not affect directives to use central bank assets "for *governmental* activities," but that the Decrees made the FRBNY Funds available for a "commercial" function. *Id.* (emphasis in original). But petitioners here are muddling their arguments under Section 1610 -- when a sovereign's own assets are subject to attachment -- with the property-law point -- which is that the FRBNY Funds were never the sovereign's property. There is nothing about the Second Circuit's conclusion under Argentine and New York law that turns on what the funds were to be used for, nor is there anything in New York or Argentine law that suggests that the purpose of a funds transfer affects the question of who owns a bank's assets.

C. Under Corporate Law Principles Also, the Republic Does Not "Own" the Assets of a Wholly-Owned Instrumentality, and Plaintiffs in the Court Below Waived Any Arguments that the Republic Abused the Corporate Form.

Petitioners also assert that the Second Circuit improperly invoked "corporate law principles" in concluding that the Decrees did not transform the FRBNY Funds into the assets of the Republic. Pet. 14-15. The Second Circuit's point was that the fact that the Republic could control its "subsidiary" BCRA, and direct BCRA to use its assets for the benefit of the Republic -- its "parent" -- would not, under ordinary corporate law principles, turn the subsidiary's assets into assets of the parent. This was clearly a correct conclusion. *See Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003) ("A corporate parent which owns the shares of a

subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary . . . . The fact that the shareholder is a foreign state does not change the analysis."); *United States* v. *Wallach*, 935 F.2d 445, 462 (2d Cir. 1991) ("[S]hareholders do not hold legal title to any of the corporation's assets. Instead, the corporation -- the entity itself--is vested with the title."); 1 William Meade Fletcher, *Encyclopedia of the Law of Corporations* § 31 at 78, 84 (rev. ed. 2006) ("Shareholders, even the controlling shareholder, cannot transfer or assign the corporation's properties and rights, nor apply corporate funds to personal debts or objects.").

Petitioners' argument that in fact Argentina abused the corporate form by directing BCRA to pay the Republic's debt, Pet. 14-15, is an argument that petitioners explicitly disavowed in the court below. As the Second Circuit's opinion states, petitioners "expressly elected not to argue in support of attachment that BCRA's separate juridical status should be disregarded because BCRA is the alter ego of the Republic." Pet. App. 27a-28a. Petitioners may not attempt to resurrect that argument now. *See, e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 194 n.13 (1976) (refusing to address a claim not raised in lower courts); 23 MOORE'S FEDERAL PRACTICE – CIVIL § 510.41 (3d ed. 2007) ("As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below -- irrespective of its general significance or novelty.").[8]

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[8] On September 25, 2006, after oral argument in the Second Circuit, petitioners in fact brought a new lawsuit seeking a declaration that BCRA is the alter ego of the Republic, and moved in that action and in the present one for new orders of attachment and restraining notices on the FRBNY Funds on an alter ego theory. Those motions are pending in the district court.

The Second Circuit properly concluded that the Decrees did not turn BCRA's assets into assets of the Republic. That determination depends on the particular effect of the Decrees and on New York property law. It is completely correct as a matter of standard banking law principles. There is no reason for the Court to review that question, yet the petition depends entirely on the cert-worthiness of that issue. If the FRBNY Funds remained BCRA's property after the Decrees, the Court would never reach the commercial-activity questions under the FSIA, which are the first two of petitioners' proposed questions for review, and to which we turn next.

II. No Circuit Has Accepted Petitioners' Argument that Assets that Could Be Used for Commercial Activity Were So Used, and There Is No Circuit Split on this Point.

The Court further should deny the petition because the Second Circuit correctly determined, under standards on which there is no circuit conflict, that even if the Republic had an attachable interest in the FRBNY Funds when they were attached on December 30, 2005, the funds were immune under the FSIA. Section 1609 of the FSIA, 28 U.S.C. § 1609, provides that the property of a foreign sovereign is immune from execution and attachment, unless an exception applies under 28 U.S.C. § 1610. Thus, treating the FRBNY Funds as the Republic's -- which they are not, and never were -- gets petitioners only as far as the commercial-activity exception. Pursuant to § 1610(a), a foreign state may effectively waive immunity from attachment in aid of execution, but only as to its property in the United States that is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(d) applies a similar rule to the waiver of immunity from pre-judgment attachment. 28 U.S.C. § 1610(d).

The court below concluded that the FRBNY Funds were neither actually used, nor designated for use, for the

supposed commercial act -- payment to the IMF -- identified by petitioners. Pet. App. 36a-37a. This limited holding -- the court of appeals specifically declined to "define the precise contours of 'used for' within the contemplation of § 1610," *id.* -- is a fact-based application of § 1610.

Petitioners argue that the Second Circuit's decision conflicts with the Fifth Circuit's holding in *Af-Cap Inc.* v. *Republic of Congo*, 383 F.3d 361, 370 (5th Cir. 2004). Pet. 23-25. But the opinion below expressly relies on *Af-Cap* and other Fifth Circuit cases. Pet. App. 36a-37a. Petitioners find a conflict only by ripping out of context a phrase in the Fifth Circuit's opinion in *Af-Cap* and treating it as the central holding.

The Fifth Circuit in *Af-Cap* explained at some length that in determining whether property is "used for" commercial purposes, the object is to determine "the predominant or essential use of the property in question" by looking both to past uses and to contemplated uses. *Af-Cap*, 383 F.2d at 368-69. The court found that the funds in question in that case had previously been used for commercial activity in a "continuing, extended, and monetarily significant" manner and that the sovereign had "contemplated engaging in the same type of use again." *Id.* at 370. In explaining its reference to "contemplated use," when the test is whether the assets are actually being "used for" commercial purposes, the Fifth Circuit made the following comment:

> "Although such contemplated use is not actual use, it is strongly suggestive that [the funds at issue] were not cordoned off for use of the Congo in its sovereign capacity."

Id. at 370.

Ignoring the first part of this remark, petitioners argue that the Fifth Circuit actually required the sovereign to

show that the funds were "cordoned off for use of the [foreign state] in its sovereign capacity," and that the Second Circuit's holding is inconsistent with such a test. Pet. 23. But in fact the Second Circuit looked to precisely this sentence, and noted, "[e]ven if actual use were not required, at least specific designation for such use would be necessary." Pet. App. 37a. This was completely consistent with the Fifth Circuit's holding and reasoning. No court has required that the sovereign instrumentality show that assets have been "cordoned off." Rather, the circuits that have decided this issue look to whether the assets are in fact being used for commercial purposes. *See Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007) ("Like the Fifth Circuit, we conclude that property is 'used for a commercial activity in the United States' when [it] is put into action, put into service, availed or employed for a commercial activity . . . .") (emphasis omitted); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, No. 03-55015, 2007 U.S. App. LEXIS 12434, at *30-*31 (9th Cir. May 30, 2007) (same).

Here, before the Decrees, the FRBNY Funds were concededly not subject to attachment. Indeed, the record shows that the Funds were comprised of (1) reserve deposits that Argentine banks are required by Argentine law and BCRA regulations to make into BCRA's FRBNY account and (2) foreign exchange reserves used by BCRA in foreign exchange transactions to implement monetary policy. Resp. App. 6a-7a. As the Second Circuit found, the Decrees did not designate the Funds for payment to the IMF. Pet. App. 37a. The Decrees merely made the Funds -- along with every other dollar, yen or pound of BCRA reserves around the world -- potentially available for that use. Based on these facts, the Fifth Circuit certainly would have arrived at the same result.

Petitioners' position -- adopted by no court anywhere -- is that because the FRBNY Funds were potentially available for the repayment of the Republic's debts, they were so used. But this effectively reads the "used for" test out of the statute and collapses the clear statutory distinction between the tests for attachment of assets of a sovereign and for attachment of assets of a sovereign instrumentality. Under § 1610(a) -- the statute applicable here, under petitioners' theory -- the assets of a foreign state in the United States are subject to attachment only if they are used for a commercial activity in the United States (and one of the other tests of that section, such as waiver, are met). In contrast, under § 1610(b), all the assets of a sovereign instrumentality are subject to attachment if the instrumentality is engaged in commercial activity in the United States (and either there has been a waiver or "the judgment relates to a claim for which the . . . instrumentality is not immune"). 28 U.S.C. § 1610(b)(2).

By reading "used for" commercial activity to mean "potentially used for" commercial activity, petitioners would subject to attachment virtually all the assets of a foreign sovereign -- and certainly all the cash or liquid assets -- if the sovereign engaged in any commercial activity anywhere. That is not the proper test and adopting it would nullify the distinction between sovereigns, on the one hand, and their instrumentalities, on the other, that Congress painstakingly adopted when it enacted the FSIA.[9] Petitioners' argument that there should be a better way for creditors to attach the

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[9] The applicable provisions of the FSIA -- namely, 28 U.S.C. § 1610(a) and (d) -- codified years of U.S. foreign relations law and were the product of substantial deliberations in both Houses, with input from the Executive Branch. *See, e.g.*, H.R. Rep. 94-1487, at 9-10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607-08 (hereinafter "House Report").

immune assets of a foreign sovereign is an argument that should be made to the legislature, not the judiciary.

III. The Second Circuit Properly Concluded that Repayments of IMF Lending Are Not a Commercial Activity Within the Meaning of the FSIA, and There Is No Circuit Split on the Issue.

Even if the Decrees transferred an attachable property interest in the FRBNY Funds to the Republic *and* the Unrestricted Reserves were "used for" the repayment to the IMF, such use still would not constitute "commercial activity" within the meaning of 28 U.S.C. § 1610(a) and (d). Petitioners assert that the Second Circuit's decision is "out of step" and "chafes against" -- even petitioners do not claim a true conflict -- decisions of this Court and of other circuits. Pet. 16. Petitioners say these other cases proceeded at a higher "level of generality" in analyzing whether the sovereign aspects of conduct were sufficiently prominent to make the activity non-commercial. Pet. 16-17. But none of the cases petitioners cite -- or any other case of which we are aware -- considered payments to or from the IMF. The cases plaintiffs point to concern very different factual scenarios, and petitioners' analysis of the "level of generality" applied is a completely subjective categorization. Conflict here apparently is in the eye of the beholder.

Moreover, all nine of the decisions that petitioners cite as inconsistent with the Second Circuit's decision arise under a different section of the FSIA -- namely, 28 U.S.C. § 1605, which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case--
>
> in which the action is *based upon* a commercial activity carried on in the United States by the foreign state; or upon an act

> performed in the United States *in connection with* a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added). That section requires only that a suit be "based upon" or "in connection with" commercial activity, rather than the much closer connection required by the attachment statute, § 1610. Pet. 16. Thus, the commercial element in the activity may be far more incidental and yet be sufficient to support jurisdiction under § 1605 than where the assets in question must be "used for" a commercial purpose under § 1610.[10] There is no conflict whatsoever -- and plaintiffs do not claim there is one -- with respect to cases under § 1610.

In any event, petitioners do not take issue with the test applied by the Second Circuit -- that is, whether the state was exercising "powers peculiar to sovereigns" as opposed to "powers that can also be exercised by private citizens." Pet. App. 32a (quoting *Weltover*, 504 U.S. at 614 (internal quotation marks and citations omitted)). This Court should not spend its time on the allegedly improper application of

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[10] *Af-Cap* v. *Chevron*, 475 F.3d at 1087 ("[T]he phrase 'used for' in § 1610(a) is not a mere syntactical infelicity that permits courts to look beyond the 'use' of property, and instead try to find any kind of nexus or connection to a commercial activity in the United States."); *id.* at 1090 ("[I]f Congress had intended to equate 'used for' with 'integral to' or 'related to,' Congress likely would have used the phrase 'in connection with,' as it did in § 1605."); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 255 (5th Cir. 2002).

the concededly correct standard where there is no circuit conflict on the application or the standard.

Moreover, petitioners are wrong in their claim of error. The activity examined in *Weltover* was the issuance of, and default on, government bonds. In holding that the lawsuit was based upon an act in connection with commercial activity, the Court rested on the fact that the bonds were "garden-variety debt instruments." *Id.* at 615. The Court identified the bonds' three commercial characteristics: "[i] They may be held by private parties; [ii] they are negotiable and may be traded on the international market (except in Argentina); and [iii] they promise a future stream of cash income." *Id.* Thus, there was "nothing about the issuance of these [bonds] (except perhaps its purpose) that is not analogous to a private commercial transaction." *Id.* at 616.

In the present action, unlike the *Weltover* bonds, there is not a single similar element of the IMF payment that *is* analogous to a private commercial transaction:

- Private parties cannot borrow from the IMF. IMF financing is available only to sovereign nations. Second Amendment of Articles of Agreement of the IMF ("IMF Agreement"), Apr. 30, 1976, arts. II & V, 29 U.S.T. 2203.

- Only sovereigns have the power to carry out the terms of IMF financing, which typically requires the member nation to implement economic reforms. IMF Agreement art. IV, §§ 1, 3; IMF Lending, http://www.imf.org/external/np/exr/facts/howlend.htm (last visited June 26, 2007); *see also* Sandra Blanco & Enrique Carrasco, *The Functions of the IMF and the World Bank*, 9 Transnat'l L. & Contemp. Probs. 67, 75 (1999) (the IMF requires "explicit commitment by the [IMF] member country to implement remedial measures in return for IMF assistance . . . . Those measures

typically have related to the domestic money supply, budget deficits, international reserves, external debt, exchange rates, and interest rates"). As the Second Circuit found, "the IMF's borrowing program is part of a larger regulatory enterprise intended to preserve stability in the international monetary system and foster orderly economic growth." Pet. App. 33a.

- A member country's obligation to repay IMF financing is not governed by a "garden-variety debt instrument" or any other type of commercial contract, but rather constitutes an international treaty obligation that member nations assume upon joining the IMF. IMF Agreement art. V § 7.

- Failure to comply constitutes a breach of the member's treaty obligations, for which the penalties include ineligibility to use IMF resources, suspension of voting rights, and ultimately the potential for expulsion from the IMF. IMF Agreement art. XXVI § 2.

- As the Second Circuit also found, "a nation state's borrowing relationship with the IMF takes place outside of the commercial marketplace." Pet. App. 36a. Whereas the typical commercial borrower obtains currency in exchange for a debt instrument, an IMF member nation purchases so-called "Special Drawing Rights" -- a reserve asset unique to the IMF and unavailable to the private sector -- or freely usable currency of other member countries in exchange for its own currency. IMF Agreement art. V. Similarly, repayment to the IMF is actually the debtor nation repurchasing its own currency. *Id.*

Moreover, petitioners' argument that all borrowing is commercial leans heavily upon a single sentence in the legislative history that includes "borrowing of money" among a list of generic examples of "commercial activity." Pet. 20-21. But the preceding paragraph makes clear that the

House Report was not suggesting that all borrowing would be "commercial." It says "a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute commercial activity." House Report at 16. AID's statutory authority has always included loan programs. *See* Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 635(b), *codified at* 22 U.S.C. § 2395(b).[11] Likewise, IMF financing -- the means by which the international community works to avert or resolve balance of payment crises that threaten the global economy -- is quintessentially sovereign in nature.

IV. The Court Should Deny the Petition Because BCRA's Reserves Are Central Bank Assets Immunized Under § 1611(b)(1).

The Court also should deny the petition because there is an alternative ground for affirmance properly raised before, but not reached by, the court of appeals. Pet. App. 38a n.22. Section 1611(b)(1) of the FSIA provides that property of a foreign state that is otherwise subject to attachment or execution under § 1610 "shall be immune from attachment and from execution, if . . . the property is that of a foreign central bank or monetary authority held for

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[11] Similarly, the House Report makes clear that in dropping a "public debt" immunity provision from the bill, Congress had in mind routine sales of bonds or borrowing from a commercial bank -- the activity at issue in *Weltover* -- and not borrowing from other sovereigns or international organizations such as the AID program or the IMF. House Report at 10 ("[B]oth *a sale of bonds to the public* and *a direct loan from a U.S. commercial bank* to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial activities.") (emphasis added).

its own account." 28 U.S.C. § 1611(b). Relying on the legislative history of the provision, every court to have considered the term has held that property is held for a central bank's "own account" if it is "used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states." House Report at 31; *see Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 385 F.3d 1206, 1223 (9th Cir. 2004); *Banco Central de Reserva del Peru* v. *Riggs Nat'l Bank*, 919 F. Supp. 13, 17 (D.D.C. 1994); *Weston Compagnie de Fin. et d'Investissement, S.A.* v. *La República del Ecuador*, 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993).

The record shows that the FRBNY Funds were used for traditional central banking functions: foreign exchange transactions to stabilize the domestic currency, and maintaining the reserve requirements of Argentina's domestic depository institutions. Resp. App. 6a-7a. While these reserves were not used to repay the IMF, even if they had been, that is a quintessential central banking activity. The vast majority of IMF members have designated their central bank as the country's fiscal agent for its transactions with the IMF. *See* sources cited *supra* at 4 n.2. Repaying IMF lending, or intermediating such repayment, is thus overwhelmingly regarded as a central banking function.

Where "there [are] other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the questions presented," a grant of certiorari is ill-advised. Robert L. Stern *et al.*, *Supreme Court Practice* 457 (8th ed. 2002). Here, regardless of whether or not the Second Circuit was right on its property or "commercial activity" holdings, the Restraints here would fail because of the central bank/monetary authority exemption.

V. There Is No Reason for This Court to Review the District Court's Denial of Discovery.

There is no reason for the Court to review the Second Circuit's conclusion that petitioners were "not entitled to any other discovery" because they "failed to show a reasonable basis for assuming jurisdiction over BCRA." Pet. App. 40a (internal quotation marks omitted). The decision to grant or deny discovery is purely discretionary and often (as is the case here) based on specific factual determinations. The standard for allowing discovery of sovereigns prior to a finding that the court has jurisdiction under the FSIA is well settled in the lower courts, and even petitioners do not suggest there is difference of opinion on the question.[12] Pet. 26-27. The trial court and court of appeals correctly applied that standard in concluding that petitioners were not entitled to, nor would they be aided by, any further discovery of BCRA. *See* Sup. Ct. R. 10 (a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").[13]

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[12] *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) ("[D]iscovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination."); *Af-Cap* v. *Chevron*, 475 F.3d at 1095-96 (same); *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992) (same).

[13] BCRA also joins in the arguments on this point made in the Republic's brief in opposition to the petition.

CONCLUSION

For the reasons discussed above, the Court should deny the petition.

Respectfully submitted,

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June 28, 2007

[*Caption*]

DECLARATION OF PEDRO H. RABASA

Pursuant to 28 U.S.C. § 1746, Pedro H. Rabasa declares as follows:

1. I am the Senior Manager of Foreign Exchange Reserves at Banco Central de la República Argentina ("BCRA"), the central bank of the Republic of Argentina (the "Republic" or "Argentina"). I have worked in the finance and economics divisions of banking institutions in Argentina and Canada for fifteen years. I began my employment at BCRA in December 2004 as the successor to Juan Basco in his capacity as manager of foreign exchange reserves. Mr. Basco has remained with BCRA as Senior Manager of Open Market Operations. I am fully familiar with the facts set forth in this Declaration.

* * *

A. The Republic Has Not "Appropriated" the Reserves of BCRA.

4. As set forth in the Basco Declaration, BCRA, as the central bank of the Republic, maintains and manages its international reserves as a fundamental part of monetary policy set and executed by it. BCRA is permitted by Argentine law to invest its international reserves only in specific types of assets. *See* Basco Decl. ¶ 10 (Exh. 1). These international reserves are property of BCRA used to carry out the central banking functions of BCRA, including regulatory activities (such as maintaining adequate reserves for the Argentine banking system) and

open market operations—purchases and sales of Argentine pesos and foreign exchange, including U.S. dollars—to stabilize the value of Argentina's currency.

5. BCRA's international reserves are held in international financial institutions, including the FRBNY, in BCRA's name and for its own account, not for the account of the Republic or any other third party. The international reserves are reflected on the balance sheets and financial statements of BCRA as assets of BCRA. *See* Organic Law of the BCRA, Law No. 24,144, art. 4 (Oct. 22, 1992, as amended) (attached hereto as Exh. 4, hereinafter, the "Charter"); Law No. 23,928/91, art. 5 (Mar. 28, 1991, as amended) (attached hereto as Exh. 5, hereinafter, the "Convertibility Law").[2] Neither Decree No. 1599, Decree No. 1601 (as defined in paragraph 10, *infra)* nor Law No. 26,076 has altered the ownership of these reserves in any way.

6. Like most central banks, part of BCRA's function is to act as a banker to its parent government by borrowing money from multilateral lending agencies like the 114?. Under its Charter, BCRA acts as the Republic's financial agent and as depositary and agent for the Republic before "international monetary, banking and financial entities, of which the Republic is a member," and is directed to enter into borrowing transactions with multilateral agencies (such as the IMF) on BCRA's behalf or on the Republic's behalf. *See* Charter, arts. 4(b), 17(d) (Exh. 4). Under these authorities, the IMP has periodically loaned BCRA funds totaling approximately USD

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[2] In seeking the attachment of BCRA's reserves at FRBNY, plaintiffs asserted that Law No. 26,076 amended the BCRA Charter, which is not true; Law No. 26,076 modified the Convertibility Law referred to above.

9.9 billion as of November 2005. *See* ME, *Argentina: Outstanding Purchases and Loans as of November 30, 2005* (attached hereto as Exh. 6). These borrowings are ultimately the Republic's debts *vis-a-vis* the IMF, but the actual borrower is BCRA, and they are recorded as liabilities on BCRA's balance sheet. *See, e.g.*, BCRA, *Financial Statement at 31.12.2004* (attached hereto as Exh. 7, hereinafter, the "Financial Statement").

7. The funds borrowed by BCRA from the IMF are for the purpose of providing financial support to the Republic, and are transferred by BCRA to the Republic for this purpose, typically in the form of an equivalent amount of Argentine pesos. The Republic always has undertaken to repay these amounts to BCRA. *See, e.g.*, Letter from Secretary of Treasury to President of BCRA (Mar. 3, 1993) (attached hereto as Exh. 8); Letter of Guillermo Nielsen and Jorge Sarghini to President of BCRA (Jan. 29, 2003) (attached hereto as Exh. 9). The Republic's obligation to repay these pesos is recorded as an asset on BCRA's balance sheet. *See* Financial Statement (Exh. 7). It is my understanding that this procedure of central bank borrowing from the IMF and transferring to the parent government is the method by which most states receive financing from the IMF.

8. BCRA always has used its reserves to pay principal and interest on its borrowing from the IMF, and the repayment of all outstanding indebtedness to the IMF (approximately USD 9.5 billion) that occurred on January 3, 2006 was no different in this respect. The January 3 repayment differed from earlier payments to the IMF only in the manner in which the Republic's corresponding obligation to reimburse BCRA has been handled.

9. Under the Convertibility Law prior to its amendment by Law No. 26,076, BCRA was required to use all of its reserves to back Argentina's monetary base.[3] Before Argentina's financial crisis at the end of 2001, Article 4 of the Convertibility Law required BCRA to maintain international reserves in an amount equal to at least 100% of the monetary base so as to maintain the fixed one-to-one exchange rate between the Argentine peso and U.S. dollar that then existed, and did not allow for any other use of any excess above the 100% of the monetary base. When the one-for-one peso/U.S. dollar exchange rate peg was abolished by Law No. 25,561/02 (Jan. 7, 2002), Article 4 was amended to require expressly that all BCRA reserves be used to back the monetary base. *See* Convertibility Law at 1 (Exh. 5). Under these provisions, whenever BCRA used its reserves to repay any portion of its IMP loans, the Republic was required contemporaneously to reimburse it with an offsetting repayment to BCRA in the equivalent amount of Argentine pesos; by removing these pesos from circulation, through this back-to-back payment, the backing of the Argentine monetary base would be unchanged by the reduction in BCRA's reserves for the IMF payment.

10. When, in the middle of 2005, the Republic's Executive Branch and BCRA began to discuss the repayment of the entire outstanding debt to the IMF, it was apparent that, due to the size of this payment, the procedure

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[3] As defined in the Convertibility Law, "[t]he monetary base in pesos is composed of the monetary circulation plus the demand deposits of the financial entities with the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA, in checking accounts or special accounts." *See* Convertibility Law at 1 (Exh. 5); *see also* Exh. 2 at 2 (same).

described in Paragraph 9 above would have to be changed, since the Republic would not have the resources to reimburse BCRA immediately for the payment from BCRA's reserves.[4] As a result of these discussions, the Executive Branch issued Decree No. 1599, which amended the Convertibility Law to allow BCRA to use the portion of BCRA reserves in excess of 100% of the monetary base (the "freely available reserves") to satisfy its obligations to the IMF. *See* Decree No. 1599, arts. 5, 6 (Exh. 2). Soon thereafter, the Executive Branch issued Decree No. 1601/2005 (attached hereto as Exh. 10, hereinafter, "Decree No. 1601"), which implemented Decree No. 1599 by authorizing the repayment of the IMF debt in full through use of BCRA's freely available reserves. *See* Decree No. 1601, arts. 1, 2. Pursuant to procedures set forth under the Argentine Constitution, Decree No. 1599 was approved by both houses of the Argentine Congress on December 21, 2005, *see* Law No. 26,076 (Exh. 3), after a floor debate that included statements in support and in opposition to such approval. BCRA agreed to finance the Republic's corresponding repayment by taking an interest-bearing payment obligation from the Republic providing for a payment of principal to BCRA in ten years. *See* Resolution No. 49 (attached hereto as Exh. 11) and Resolution No. 4 (attached hereto as Exh. 12).

11. It is therefore completely erroneous for plaintiffs to suggest that the Republic has taken or appropriated BCRA's reserves to pay the IMF, or for any other pur-

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[4] Statements in the Argentine press to the effect that this repayment was somehow a surprise to BCRA are completely untrue. Officials of BCRA were involved in discussions with the Executive Branch in connection with this repayment for months before it was announced.

pose. BCRA's reserves remain BCRA's reserves, and are not property of the Republic or anyone else. Law No. 26,076 did not change this fact; in effect, it simply increased BCRA's capacity to make the early repayment of the IMF loan. BCRA's role in borrowing from the IMF for the Republic and repaying these borrowings from its reserves, both in earlier transactions and in the recent payment to the IMF, are traditional central banking activities, and in no way make BCRA's reserves property of the Republic.

B. The Attached Account at the FRBNY Consists of BCRA Reserves That Were Not Used in the Payment to the IMF.

12. BCRA maintains a single account at the FRBNY. The *ex parte* orders obtained by plaintiffs on December 30, 2005 have resulted in the freezing of approximately USD 105 million in this account.

13. None of these frozen funds were intended to be used, or were used, to pay the IMF. Rather, the payments for the IMF were made from other sources. The frozen funds have two sources and uses. First, a portion of them represent the deposits that Argentine banks are required by Argentine law and BCRA regulation to make into BCRA's FRBNY account sufficient to cover the banks' reserve requirements. *See* Charter, art. 18(h) (Exh. 4). Depending on the level of foreign exchange deposits in Argentine banks, their reserve requirements increase or decrease, resulting in continual payments into and out of this account. The receipt and investment of Argentine bank reserves is a traditional central banking function, which is essential to the supervision of the safety and soundness of the Argentine banking system.

14. The balance of the frozen funds are BCRA reserves used by BCRA in open market foreign exchange transactions necessary to implement monetary policy, which is part of BCRA's core function of regulating the Argentine banking system and financial sector. Like all central banks, BCRA buys and sells U.S. dollars against its local currency (in the case of BCRA, the Argentine peso) in order to inject liquidity, support the Argentine currency and stabilize its market value.

[*Excerpts from Exhibits 4 and 5 reprinted below. Other exhibits not reprinted.*]

EXHIBIT 4

Law 24.144
Central Bank of the Argentine Republic's Charter

CHAPTER I
- Role and Purpose -

Article 1—The Central Bank of the Argentine Republic (Banco Central de la República Argentina) ("BCRA") is a self-administered institution of the National State governed by the provisions of this act and other legal rules applicable.

* * *

[3]Article 4—BCRA shall perform the following duties:

* * *

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[3] L. 25 562, art 2°.

b) Act as a financial agent for the National State, and as depository and agent for the country before international monetary, banking and financial entities, of which the Nation is a member;

* * *

CHAPTER V
- BCRA's Transactions -

[11]Article 17—BCRA shall:

* * *

d) Enter into payment transactions derived from international agreements and borrow loans from foreign multilateral agencies and foreign instrumentalities, central banks or such entities of which the BCRA may solely be a borrower, on its behalf or on behalf of the National Treasury as the Argentine Republic's Financial Agent.

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[11] L 24.485, art 2°, D 1523/01, art. 1°; D. 1526/01, art. 1°, L. 25 562, art 6°

EXHIBIT 5

Law No. 23,928 of 03/27/91

CONVERTIBILITY OF THE AUSTRAL

Law No. 23,928

Passed: March 27, 1991

Promulgated: March 27, 1991

TITLE I

OF THE CONVERTIBILITY OF THE AUSTRAL

* * *

ARTICLE 6°—The assets that compose the reserves mentioned in the previous article constitute the common guarantee *(prenda común)* of the monetary base, they are not subject to attachment, and may be applied exclusively to the purposes contemplated under this law. The monetary base in pesos is composed of the monetary circulation plus the demand deposits of the financial entities with the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA, in checking accounts or special accounts.

(Article substituted pursuant to art. 4° of Law No. 25,561 O.G. 1/7/2002).

* * *

[*Caption*]

SUPPLEMENTAL DECLARATION OF PEDRO H. RABASA

Pursuant to 28 U.S.C. § 1746, Pedro H. Rabasa declares as follows:

1. I am the Senior Manager of Foreign Exchange Reserves at Banco Central de la República Argentina ("BCRA"), the central bank of the Republic of Argentina (the "Republic" or "Argentina"). On January 6, 2006, I submitted a Declaration in support of BCRA's motion by order to show cause to vacate the *ex parte* orders of attachment and restraining notice entered in these actions (together, the "Orders").

2. I submit this Declaration (A) to provide the Court with further detail regarding the chronology of events resulting in the payment by BCRA of approximately USD 9.5 billion in outstanding indebtedness to the International Monetary Fund ("IMF") on January 3, 2006 from BCRA reserves located outside the United States, and (B) to address certain assertions made by plaintiffs in their memorandum in support of their motion to confirm the Orders and in opposition to BCRA's and the Republic's motions to vacate the Orders ("plaintiffs' memorandum"), which I have reviewed.

B. Chronology of Events.

3. On December 15, 2005, the President of the Republic, Néstor Kirchner, issued Decree of Necessity and Urgency No. 1599/2005 ("Decree No. 1599"), which amended the "Convertibility Law" to allow BCRA to use the portion of BCRA reserves in excess of 100% of the

monetary base (the "freely available reserves") to satisfy its obligations to the IMF. *(See* Exh. 2.)[1]

4. Also on December 15, 2005, the President issued Decree No. 1601/2005 ("Decree No. 1601"), which implemented Decree No. 1599 by authorizing repayment of the IMF debt in full through use of BCRA's freely available reserves. *(See* Exh. 10.)

5. On December 21, 2005, Decree No. 1599 was approved by both houses of the Argentine Congress and ratified as Law No. 26,076/05 ("Law No. 26,076"). *(See* Exh. 3.)

6. On December 29, 2005, the Ministry of Economy and Production issued Resolution No. 49, by which:

a. BCRA was authorized to repay debt to the IMF *(see* Exh. 11, art. 1.); and

b. The Secretariat of the Treasury and the Secretariat of Finance were instructed to compensate BCRA for the repayment to the IMF by issuing to BCRA an interest-bearing note with a principal value equal to the sum paid to the IMF. *(See* Exh. 11, arts. 2-3; Exh. 12.)

7. On December 29, 2005, the board of directors of BCRA at its weekly meeting adopted a resolution approving the repayment of the entirety of BCRA's obligations to the IMF.[2]

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[1] Unless otherwise specified, references to exhibits ("Exh.") in this Declaration are to exhibits attached to my Declaration dated January 6, 2006.

[2] BCRA is managed by a board of directors appointed by the National Executive Power with the consent of the Senate, with each director serving a six year term. *(See* Exh. 4 (Organic Law of the BCRA, Law No. 24,144, arts. 6-7 (Oct. 22, as amended); Exh. 1 (Declaration of Juan Basco, dated March 14, 2005) ¶ 5.)

8. I understand from counsel that the Honorable Barbara S. Jones of the United States District Court for the Southern District of New York signed the Orders at 12:05 p.m. EST on December 30, 2005.

9. Without notice or knowledge of the entry of the Orders, at 2:36 p.m. Argentine time (12:36 p.m. EST) on December 30, 2005, I personally supervised the transmission, through the SWIFT system,[3] of the orders to transfer a total of approximately USD 9.5 billion from various BCRA accounts, including a surplus account maintained by BCRA at the IMF, to the IMF's account in Washington, D.C. No accounts located in New York were used to make these payments settling BCRA's obligations to the IMF.

10. The Orders were served on the Republic's designated agent for service of process, Banco de la Nación, at 4:00 p.m. EST, 6:00 p.m. Argentine time, on December 30, 2005. Later that day, at about 8:00 p.m. Argentine time (6:00 p.m. EST), in a call from Federico Molina, the Financial Representative of the Republic in the United States, I personally learned that Banco de la Nación had received the Orders. During that call, which I received at my home, Mr. Molina told me that he had learned about the Orders from the Republic's counsel at about 5:00 p.m. EST. To my knowledge, I am the first BCRA official to have learned about the Orders. Accordingly, BCRA issued the directions for the payment to the IMF before Republic or BCRA received notice of the Orders.

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[3] "Swift," or the Society for Worldwide Interbank Financial Telecommunication, is a financial-industry-owned co-operative supplying standardized messaging services and interface software to 7,800 financial institutions in more than 200 countries.

11. I understand from reports from the institutions from which BCRA effected the payment to the IMF that those institutions made that payment at or about the opening of business in their respective countries on January 3, 2006 in the ordinary course of business and in accordance with the instructions sent by BCRA.

12. I reaffirm that none of the BCRA reserves frozen in its account at the FRBNY were intended to be used, or were used, to pay the IMF. Rather, the January 3 payment to the IMF was made from sources outside of the United States.

* * *

[*Caption*]

DECLARATION OF CARLOS GUSTAVO GERSCOVICH

Pursuant to 28 U.S.C. § 1746, Carlos Gustavo Gerscovich declares as follows:

1. I am an adjunct professor on the law faculty of University of Buenos Aires in Argentina. I also teach law at the University of Rio Grande del Sur, the University de Caxias del Sur and other universities in Brazil. I am a visiting professor and scholar in Finance and Development Law at the London Institute of International Banking, and an external evaluator for the London School of Economics and Political Science. I have authored some seventy articles and twelve books, including on banking law and on emergency legislation. I also practice law with the firm of Aguirre, Saravia & Gebhardt. I received my law degree at the University of Buenos Aires in 1965. I have practiced law for 40 years. From 1988 to 1991, I was the Legal Manager of the Banco Central de la República Argentina ("BCRA"), the central bank of the Republic of Argentina (the "Republic" or "Argentina"). A copy of my professional resume is attached as Exhibit A. I am fully familiar with the facts set forth in this Declaration.

2. I submit this Declaration to explain to the Court my opinion regarding the legal effect of Decree of Necessity and Urgency No. 1599/2005 of December 15, 2005 (hereinafter, "Decree No. 1599"), ratified by Law No. 26,076/05 (Dec. 21, 2005) (hereinafter, "Law No. 26,076"), and Decree No. 1601/2005 of December 15, 2005 (hereinafter, "Decree No. 1601").

3. Under Argentine law, neither Decree No. 1599, nor Degree No. 1601 nor Law No. 26,076 has altered the ownership of BCRA's reserves in any way. This conclusion is based on the following analysis:

4. The Organic Law of the BCRA (Law No. 24,144 of October 22, 1992 as amended) establishes in its Article 4(c), that the BCRA has as one of its functions to "concentrate and administer its reserves in gold, currency and other external assets"

5. The Convertibility Law (Law No 23,928 of March 28, 1991), which established a Currency Board, directed the BCRA to maintain reserves equal to 100% of the monetary base. (Articles 4, 5 and 6 of the Convertibility Law). Any amounts in excess of 100% of the monetary base were considered excess reserves. However, both categories clearly constituted reserves and nothing in this Law in any way altered the fact that these reserves are property of the BCRA as stated in the BCRA Organic Law. By its terms, the law recognized that it was the BCRA that had the responsibility for owning and administering the reserves.

6. When the Currency Board was discontinued in response to the financial crisis of 2001, Law No. 25,561 of January 7, 2002 modified Articles 4, 5 and 6 of the Convertibility Law to provide that all of the reserves owned by the BCRA should be designated to support the monetary base. Again, nothing in this Law purported to alter the BCRA's ownership of the reserves held by it pursuant to its Charter.

7. The most recent modifications to the Convertibility Law effected by Decree 1599, ratified by Law No. 26,076 of January 10, 2006 again modified Articles 4, 5 and 6 of the Convertibility Law to revert to previous dis-

tinctions, under the BCRA is to hold reserves equal to the monetary base, and any excess of its reserves over this amount could be used for central bank purposes in paying back loans from multinational lending agencies. Here again, nothing in these modifications alters the BCRA's ownership of its reserves. These modifications were simply designed to give the BCRA greater flexibility in the use of the reserves owned by it.

8. Resolution 49 of the Ministry of Economy and Production of December 12, 2005 documents the use, at the request of the Executive Branch, of a portion of the BCRA's reserves to repay obligations to the International Monetary Fund and contains the Ministry's commitment to provide the BCRA with an asset in compensation for the reserves paid over to the Fund, that is, a Draft of the Ministry reflecting the Ministry's obligation to pay an amount equal to the amount of the reserves utilized as described above. Nothing in this Resolution indicates in any way that the BCRA's ownership of its reserves is altered in any way. On the contrary, the Ministry's commitment to compensate the BCRA for the use of its reserves is a clear recognition that the reserves belong to the BCRA.

I declare under penalty of perjury under the laws of the United States of America that the described facts are true and correct and that the opinions reflect my criteria over those issues.

Dated: January 11, 2006
Buenos Aires, Argentina

/s/ CARLOS GUSTAVO GERSCOVICH
CARLOS GUSTAVO GERSCOVICH

DECLARATION OF HORACIO LIENDO

1. I am a Lawyer (1977) and Doctor of Law and Social Sciences, in both cases a graduate of the National University of Buenos Aires, I was a Director of the Central Bank of the Republic of Argentina (1991), Sub-secretary of Finance at the Ministry of Finance in charge of the negotiation of the Argentinean foreign debt (1991/1992) and Secretary of Legal, Technical, and Administrative Coordination of the Ministry of Economy and Public Works and Services of the Republic of Argentina (1992/1996). At the time, I designed and wrote the draft of what would later become the Convertibility Law 23.928, and I participated in the negotiation of the contract for the restructuring of the debt with private creditors under the Brady Plan.

2. I submit this declaration to inform the Court of my opinion on the latest amendments introduced in the Convertibility Law 23.928 by Decree 1599/05, ratified by Law 26.076 and its possible impact on said partial waiver of sovereign immunity.

3. The analysis will take into account the provisions of the United States Foreign Sovereign Immunities Act of 1997[1] which mandates that even though the reserves of the Central Bank are in principle non-attachable[2], this condition may be waived by the central banks or the respective states and, in case of a waiver or limitation to the non-attachable character of the reserves, such waiver or limitation may not be subsequently cancelled to reestablish the non-attachable character.[3]

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[1] Foreign Sovereign Immunities Act of 1977.

[2] See Section 1611(b)(1) of the United States Foreign Sovereign Immunities Act.

[3] Idem previous note.

4. In debt issue contracts prior to the default, the State waived sovereign immunity with certain exceptions, including that concerning the *free reserves* of the Central Bank backing up the monetary base according to the Convertibility Law, and which will be reflected as such in the balance sheet of the Central Bank.

5. The abandonment of the fixed convertibility ratio by Law 25.561 eliminated the distinction between the *free reserves* backing up the monetary base and those that exceeded such purpose. All *free reserves* backed up the monetary base, regardless of the magnitude of both.

6. Before the modification introduced by Decree 1599/05, the *reserves* of the Central Bank backing up the monetary base could be used only for this purpose. In other words, the Treasury could not use them to pay its obligations and the Central Bank could not use them for a purpose other than to back up the monetary base for which the reserves were a *common pledge.*

7. Decree 1599/05 introduced changes in Article 4, 5 and 6 of Law 23.928, which had been previously partially repealed and amended by Law 25.561.

8. After the amendment of Decree 1599/05, part of the reserves, even though they are called "free reserves," are NO longer *common pledge of the monetary base,* nor do they back it up and can be used to pay the public debt of the Treasury, even though the internal rule limits it to the debts to international agencies[4].

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[4] See last paragraph in Article 6 of Law 23.928 after its amendment by Decree 1599/05 which reads: Whenever the result is a neutral monetary effect, free reserves may be applied to the payment of obligations contracted with international financial entities."

9. The part of the *reserves* that continue backing up 100% of the monetary base and are its common pledge, are NOT qualified now as "freely available."

10. Decree 1599/05 uses the expression *"free reserves"* with a meaning different than that valid at the time of the execution of the debt issue contracts of the Treasury in the international market prior to the 2002 default.

11. Article 5 of Law 23.928, after being amended by Decree 1599/05, establishes that "The reserves which exceed the percentage established in Article 4[5], will be named free," although before that, the qualification "free" was used to describe which of the reserves of the Central Bank could be computed for the *backup of the monetary base,* since those reserves committed to a different purpose by the Central Bank were not *free* for monetary conversion operations, either at a fixed ratio (Articles 1, 2 and 3 of the original Law 23.928) or at a floating ratio (Law 25.561 and Decree 260/02).

12. In the debt issue contracts the Argentinean state did not waive the sovereign immunity of the *free reserves* with the scope described in the original language of the Convertibility Law.

13. However, that concept changed substantially after its amendment by Decree 1599/05 and now refers to the part of the *reserves* which do NOT back up the monetary base and therefore do not have any purpose relating them to the stabilization or preservation of the value of the currency.

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[5] 100% of the monetary base.

14. Decree 1599/05 requires as a condition to use the *free reserves* in their new meaning, that their use have "neutral monetary effect." which means that the monetary base must be backed up 100% with reserves of the Central Bank.

15. Although the Law does not say so expressly, there is no other way to make the aforementioned calculation but considering the "reserves" at their market value in pesos.

16. From a substantive viewpoint (as opposed to the literal expression) the reserves that exceed the ratio of 100% of the monetary base at market values may not be included in the exception to the waiver of sovereign immunity after the amendment of Decree 1599/05, since their allocation to the convertibility of the local currency was the public purpose for which the Argentinean state did not agree to waive its sovereignty in them, a purpose which the State itself now does not consider necessary[6].

17. On the other hand, if the main reason for which a special status is recognized for the *reserves* of the central banks is their function as stabilizer of the respective national economies, the Argentinean state has declared that part of them constitute a *surplus* over that purpose and that it can maintain the normal operation of its economy without them[7].

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[6] See in the same vein Financial Environment, Can they attach the reserves now?, page 1, edition of December 10, 2005.

[7] See Decree 1601/05, where, in the whereas paragraphs, one reads: "the balance of payments currently shows commercial and current account surpluses that assure the generation of foreign currency and the sustainability of the foreign accounts"; "that . . . we can see a situation of fiscal solvency that allows assuring the strength of the economy in possible

I declare under penalty of perjury under the laws of the United States of America that the facts described are true and that the opinions expressed reflect my position concerning these matters.

Executed on January 10, 2006 in Maldonado, Uruguay.

[signature]

HORACIO TOMAS LIENDO (h)

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unfavorable foreign scenarios"; and "that, in a floating exchange system, the current level of international reserves exceeds by far the margins necessary to maintain adequate monetary and exchange policies."

[LETTERHEAD OF FEDERAL RESERVE
BANK OF NEW YORK]

January 12, 2006

BY HAND

Hon. Thomas P. Griesa
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1630
New York, NY 10007-1312

Re: EM Ltd. v. The Republic of Argentina, Docket No. 03 CV 2507 (TPG)

NML Capital, Ltd. v. The Republic of Argentina, Docket Nos. 03 CV 8845 (TPG), 05 CV 2434 (TPG)

Dear Judge Griesa:

I represent the Federal Reserve Bank of New York ("FRBNY"), which is a garnishee in the above-referenced matters. I write regarding the pending motion by the Republic of Argentina to vacate the restraining notices and orders of attachment that have frozen a balance in the accounts of the Banco Central de la Republica Argentina here at the FRBNY.

The instant motion raises significant issues regarding the immunity of foreign central bank accounts in the United States. The FRBNY thus offers the enclosed Declaration of Thomas C. Baxter, Jr. to assist the Court in its deliberations.

Should the Court require additional information, I may be reached at (212) 720-2502.

Respectfully submitted,

/s/ BARRY SCHINDLER
Barry M. Schindler (BS 8391)
Counsel and Assistant Vice President

Enclosure

cc: Jonathan I. Blackman,
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Joseph E. Neuhaus,
Attorney for Banco Central de la República Argentina
Robert A. Cohen,
Attorney for Plaintiff NML Capital, Ltd
Dennis H. Hranitzky,
Attorney for Plaintiff EM Ltd.

[*Caption*]

DECLARATION OF THOMAS C. BAXTER. JR.

Pursuant to 28 U.S.C. § 1746, Thomas C. Baxter, Jr. declares as follows:

1. I am General Counsel and Executive Vice President of the Federal Reserve Bank of New York ("FRBNY"). I have held this position since March 1995. The FRBNY is one of twelve regional Federal Reserve Banks, which, along with the Board of Governors of the Federal Reserve System and the Federal Open Market Committee, comprise the Federal Reserve System, the central bank of the United States.

2. I make this declaration to assist the Court in assessing whether the balance in the accounts that has been restrained in the instant case should be subject to attachment or execution.

3. Among its many functions, the FRBNY serves as the international operating arm of the Federal Reserve System. As such, the FRBNY conducts foreign exchange operations, maintains accounts at foreign central banks, and holds on its books the accounts of more than one hundred central banks and monetary authorities around the world.

4. The FRBNY holds accounts on its books for the Banco Central de la República Argentina ("BCRA"), which is the central bank of the Republic of Argentina. The BCRA has had an account relationship with the FRBNY since 1935.

5. Central banks generally perform a variety of functions on behalf of the sovereign.

These central banking functions include some or all of the following:

(a) issuance of notes, coin, and legal tender;

(b) custody and administration of the nation's monetary reserves through the holding of gold, silver, domestic and foreign securities, foreign exchange, acceptances and other credit instruments, and International Monetary Fund Special Drawing Rights;

(c) establishment and maintenance of reserves of depository institutions;

(d) discounts and advances to depository institutions;

(e) receipts of deposits from the government, international organizations, depository institutions, and, in special cases, private persons;

(f) open market operations;

(g) implementing foreign exchange policy;

(h) representing the sovereign in dealings with other central banks and international monetary organizations;

(i) credit controls; and

(j) licensing, supervision, and inspection of banks.

6. In large part because of the safety and stability of the dollar and the United States' financial, political and judicial systems, many countries maintain part of their exchange reserves in dollar-denominated assets in the United States. Under home country law, these reserves are sometimes assets of the national government. Nonetheless, when reserves are held outside of the home country, they are typically held in an account owned and controlled by the country's central bank. Maintaining

and managing these reserves is a typical central bank function.

7. There are accounts on the FRBNY's books that are denominated as "Central Bank of X, acting as Fiscal Agent for the Republic of X." We style these fiscal agency accounts in this way for a specific purpose—the style reveals that the central bank holds legal title to and has sole control over such an account, but the government is the beneficial owner of the property interest that is represented by a positive balance in such an account. The BCRA does not maintain an account at the FRBNY that is styled in the "fiscal agency" manner. Consequently, from our perspective, the balance in the BCRA's accounts is the property of the BCRA and not the Republic of Argentina.

Dated: January 12, 2006
New York, New York

/s/ THOMAS C. BAXTER, JR.
Thomas C. Baxter, Jr. (TB 9351)

Supreme Court, U.S.
FILED
JUL 11 2007
OFFICE OF THE CLERK

No. 06-1576

In the Supreme Court of the United States

EM LTD. AND NML CAPITAL, LTD.,
Petitioners,

v.

REPUBLIC OF ARGENTINA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not defend critical portions of the reasoning of the court of appeals; instead, they try to substitute other rationales – *not* accepted by the court of appeals – to reach the same results. And respondents do not respond to critical arguments made in the petition for a writ of certiorari; instead, they respond to various arguments petitioners are *not* making, and various caricatures of the arguments petitioners *are* making.

There is a reason for such obfuscation. Only by complicating this case can respondents hope to obscure the fundamental strength of petitioners' position. When Argentina designated billions of dollars of assets around the world for use in repaying Argentina's debt to the IMF, it *used* those assets for the commercial purpose of repaying one loan and made those same assets available to repay other valid loans Argentina would prefer not to pay. The nominal ownership of those assets by the Central Bank was no more of an obstacle to petitioners' attachment of those assets than it was to their use for payment of a debt Argentina – not the Central Bank – owed to the IMF. And, although petitioners maintained below and still maintain in this Court that there are enough facts in the record to *allow* the attachments, they maintained below and still maintain in this Court that *disallowing* the attachments is improper and a denial of due process if the disallowance rests on *factual* determinations on matters as to which petitioners were denied discovery.

1. To resolve the question whether the assets petitioners attached fell under the FSIA's definition of "property" of a foreign state, 28 U.S.C. § 1610(a), (d), the Second Circuit understandably did not rely on any conclusions about Argentine law, the Uniform Commercial Code, banking law, or unusual provisions of New York law. Rather, its conclusion was based on two paragraphs of analysis (Pet. App. 21a-22a) that expressed unfounded worry over the implications of petitioners' position and applied principles of corporate law by analogy.

Respondents' obfuscatory tactic – relying on many sources of law that played no role in the Second Circuit's reasoning and shed no useful light on the FSIA's definition of property (BCRA Br. in Opp. 13-18) – reveals the weakness of the reasoning the Second Circuit *did* apply. Nowhere did the Second Circuit answer – nor can any source of law respondents cite answer – petitioner's simple point that, by *borrowing* several billion dollars from its Central Bank and making them available to pay one preferred creditor *of Argentina*, Argentina had to have made those assets its "property" under the FSIA, even if it directed the Central Bank to pay the preferred creditor directly rather than send the borrowed money to the government to send to the IMF.[1] Nowhere did the Second Circuit answer – nor can any source of law respondents cite answer -- the question how it can possibly be that assets sufficiently controlled by Argentina to pay Argentina's preferred creditor can be considered "assets in which the judgment debtor has no interest" (Pet. App. 22a n.13 (internal quotation marks omitted)) when disfavored creditors seek to attach the same assets. Instead, the Second Circuit blessed a shell game, in which Argentina by decree tells the Central Bank to pay one creditor yet Argentina disclaims any attachable interest in the same assets when different creditors seek to invoke legal process against them. This will not do: "The attachment was not aimed at central bank reserves general-

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[1] BCRA asserts that only if there was an "appropriation" of its assets by Argentina could this Court resolve the first question presented in petitioners' favor or reach the other questions presented. BRCA Br. in Opp. 1. Assets *borrowed* from someone else, however, are just as subject to attachment as assets taken from someone else. See N.Y. C.P.L.R. § 5201(b) ("A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested * * *."). It was only after petitioners attached the FRBNY funds that Argentina revealed that it had purported to commit to repay the Central Bank for funds used to pay the IMF. See Pet. App. 143a-148a (Resolution No. 49). Thus, if Argentina's commitment is a real one (a subject on which petitioners have not been allowed discovery), the funds were borrowed rather than appropriated, but either way they were diverted from Central Bank uses to use for repayment of *Argentina's* debt to the IMF.

ly, just funds that were to be used for debt repayment. These funds * * * were in the process of being withdrawn – the question was who should have them, the IMF or private creditors." Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina*, Washington Legal Foundation, Working Paper Series No. 140, at 30 (Sept. 2006), available at http://atfa.org/resources/scott_wp.pdf.

The Second Circuit *acknowledged* that a mere shareholder cannot transfer or assign a corporation's properties and rights or apply the corporation's funds to the shareholder's debts. Pet. App. 22a. Yet Argentina *did* transfer assets held in the Central Bank's name to the IMF and apply those assets to Argentina's debts. How? By borrowing those assets and promising to repay them. Pet. App. 143a-148a (Resolution No. 49). The Second Circuit simply ignored Resolution No. 49 and reached the exact opposite conclusion from the one dictated by the very principles of corporate law it cited.

To accept the Second Circuit's reasoning (or the rationales respondents seek to substitute for that reasoning) would be to open a gaping loophole in the protections Congress intended to give creditors. All a nation needs to do to keep its assets from being attachable is leave those assets in someone else's hands until the moment those assets are transferred to a third party in furtherance of the nation's purposes, and then disclaim that "ownership" of the assets ever passed to the nation. Whether to allow such a loophole to be created depends on whether it is consistent with the policies and purposes of the FSIA, not on esoteric debates about the content of manipulable foreign law. The Second Circuit's creation of such a loophole gives rise to an issue of exceptional importance meriting this Court's review.[2]

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[2] See also Pet. App. 104a (remarks of Judge Griesa: "There's not a whimper of an idea that the Republic might pay the judgments which they really should pay."). Scott, *supra*, at 42-43 ("*Don't cry for Argentina*. It was able to restructure $80 billion of debt with a massive haircut and ignore the $30 billion still owed to non-tendering bondholders - with impunity. Argentina returned to the bond markets, continued to attract foreign investment, and

2. The Second Circuit held that borrowing from and repaying the IMF is not a "commercial activity." Pet. App. 30a-35a. As the petition carefully explained (at 16-22), the Second Circuit's error – and its means of placing itself in conflict with this Court's decision in *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 614 (1992), and decisions of other courts – was to conduct its analysis at the wrong level of generality. *With no explanation of any kind*, the court merely *assumed* that the characteristics of IMF loans were relevant instead of analyzing – as required by *Weltover*, 504 U.S. at 614 – the "*type* of actions" of which IMF loans are just one example.

The Central Bank glibly responds that "the 'level of generality' applied is a completely subjective categorization" and that "[c]onflict here apparently is in the eye of the beholder." BCRA Br. in Opp. 22. But the courts do not lack for guidance on the level of generality at which this analysis should be conducted. As the petition explained (at 21), the House Report lists "borrowing of money" *simpliciter* as a commercial activity and further indicates that loans from a "public lending institution located in the United States" are included. Congress's intent that "commercial activity" include borrowing and repayment of loans extended by public lending institutions such as the IMF is confirmed by other evidence in the legislative history, including Congress's decisions to nix as "inappropriate" a proposed "public debt" provision and to include in 28 U.S.C. § 1611(a) an exception to the attachment rules limited to funds *disbursed to* foreign states by certain designated organizations (including the IMF). See Pet. 16-17, 20-21. The appropriate level of generality is thus *not* left to subjective assessment or the eye of the beholder, and the Second Circuit simply got it wrong.[3]

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avoided creditor sanctions. Under this scenario, why would any country repay its debt?").

[3] Respondents repeat the Second Circuit's mistake by focusing at length on the special characteristics of IMF loans. BCRA Br. in Opp. 24-25.

Respondents try to negate the crystal-clear legislative history by quoting the House Report's observation that "a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity." BCRA Br. in Opp. 26 (quoting H.R. REP. 94-1487, at 16, *reprinted in* 1976 USCCAN at 6615). But there is no inconsistency whatever between that statement and the categorical rule, stated on the very same page, that all borrowing is commercial. Assistance by AID "may be furnished on a grant basis or on such terms, including cash, credit, or other terms of repayment * * * as may be determined to be best suited to the achievement of the purposes of this chapter." 22 U.S.C. § 2395(a). Because participation in a foreign assistance program administered by AID can take forms other than loans, it is unquestionably true that "*mere* participation" – the phrase used in the House Report – is not enough to bring the participant within any exception for commercial activities.

Respondents' other arguments are mere makeweights. Respondents ascribe significance to the fact that petitioners cite decisions construing the phrase "commercial activity" in 28 U.S.C. § 1605 rather than the same phrase in *id.* § 1610. BCRA Br. in Opp. 22-23. But no court has *ever* suggested that an activity deemed "commercial" for one section can be deemed noncommercial for the other. The difference between the sections is that one rests jurisdiction on an act performed "in connection with" a commercial activity and the other rests the power to attach on a determination that an asset was "used for" such an activity. Petitioners must – and do – meet the "used for" test (see Pet. 22-25; point 3, *infra*), but the question whether the activity of borrowing and repaying loans is commercial does not have different answers for purposes of the two different sections of the FSIA. And respondents argue that this Court's holding in *Weltover* "rested on the fact that the bonds were 'garden-variety debt instruments.'" BCRA Br. in Opp. 24 (quoting 504 U.S. at 615). But the Court's language shows that it did not rest

its holding on the garden-variety nature of the debt. It said only, "The commercial character of the [bonds] is *confirmed by*" their garden-variety nature. 504 U.S. at 615 (emphasis added).

3. Respondents insist – in their argument heading, and in two lengthy paragraphs of argument – that petitioners have argued "that assets that *could be* used for commercial activity were so used" and that "'used for' commercial activity * * * mean[s] 'potentially used for' commercial activity." BCRA Br. in Opp. 18, 21 (capitalization altered, emphasis added). But that is a caricature of petitioners' position. *Never* have petitioners argued that mere potential availability of an asset for a commercial activity makes it an asset "used for a commercial activity" within the meaning of 28 U.S.C. § 1610(a). What petitioners *have* argued is that *designation* of an asset to be used for loan repayment constitutes use of that asset for a commercial activity. Any other holding would preclude all attachments of money, including money on deposit in a foreign nation's accounts at *private* commercial banks in the United States, because treating the *completion* of payment of money (rather than the earmarking of the money *for* payment) as the only relevant "use" would guarantee that the money has left the sovereign's control before it can be attached. Notably, respondents do not deny that the Second Circuit's cramped understanding of "use" would lead to that absurd result.

Notwithstanding respondents' pejorative (and colorful) reference to "ripping out of context a phrase in the Fifth Circuit's opinion in *Af-Cap*" (BCRA Br. in Opp. 19), the question of how to determine what money has been "used for" *before* it leaves the sovereign's hands is exactly the central problem that the Fifth Circuit addressed in *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361, 370 (5th Cir.), on rehearing, 389 F.3d 503 (5th Cir. 2004), cert. denied, 544 U.S. 962 (2005). The court did not merely state once, in isolation, that the tax and royalty obligations at issue in that case were used for a commercial activity because they were "not cordoned off for use of the Congo in its sovereign capacity." 383 F.3d at 370. The Fifth Circuit also re-

peated that what is protected is *only* "funds so central to a nation's operations as a sovereign that uses thereof would interrupt the public acts of this foreign state." *Id.* at 371 (internal quotation marks and brackets omitted). And it also emphasized that "evidence of contemplated commercial use would greatly aid a court in making a determination of the general commercial or non-commercial nature of particular property." *Id.* at 370 n.11. The Fifth Circuit used a number of different verbal formulations but came back repeatedly to its central holding that designating assets for commercial purposes, so that their use for commercial purposes would not interrupt the sovereign's public acts, constitutes using those assets for commercial purposes. The Second Circuit's holding is in square conflict with that holding of the Fifth Circuit.

There remains the argument that the Unrestricted Reserves were a massive, undifferentiated pot of money, from which the Second Circuit concluded (Pet. App. 37a) that their designation for use in repaying the IMF was not specific enough to constitute use of them. See BCRA Br. in Opp. 20. The Fifth Circuit certainly would *not* have arrived at the same result. The reason is not *just* that Argentina could have cordoned off particular assets for sovereign use but failed to do so. The reason is *also* that designation of *all* the Unrestricted Reserves for repayment of a loan constituted use of them within the contemplation of *Af-Cap*, and that designating those funds for loan repayment proved that they were not so central to Argentina's operations as a sovereign that uses of them would interrupt Argentina's public acts. *Every* formulation the Fifth Circuit used – not just its "cordoned off" formulation – indicates that the Fifth Circuit would have treated as a "use" Argentina's designation of Unrestricted Reserves as earmarked for loan repayment. The circuit conflict on this question is palpable, and respondents can try to escape it only by mischaracterizing both petitioners' argument and the Fifth Circuit's central holding in *Af-Cap*.

4. Even respondents admit that discovery "of specific facts crucial to the immunity determination" is required by other cir-

cuits. Argentina Br. in Opp. 16 (quoting *Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007)). Even they admit that post-judgment discovery must be allowed under other circuits' case law when it goes "directly to a central fact necessary to the immunity inquiry: whether the property at issue was used for commercial activity in the United States." *Id.* at 15 n.5 (citing *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 251 (5th Cir. 2002)). Those standards would not have required discovery if the courts below had accepted petitioners' theory of the case, under which Argentina's borrowing of Central Bank funds to repay the IMF amounted to use of all of the Unrestricted Reserves for a commercial activity. But the court of appeals' theory of the case instead deemed crucial the absence of "evidence" of ownership transfer or use of the FRBNY funds. See Pet. 29. To adopt a legal theory that makes such evidence crucial, and deny petitioners discovery to find such evidence, is a denial of due process and creates multiple circuit splits.

Argentina seeks to evade that conclusion by characterizing as a run-of-the-mill "discovery dispute[]" petitioners' contention it was entitled to some discovery. Argentina Br. in Opp. 12. That characterization is mere wordplay. Petitioners are not asking this Court to micromanage the underlying litigation but instead to vindicate their due process and FSIA rights to show that the FRBNY funds are attachable assets of Argentina.

Argentina also falsely asserts that petitioners disavowed any need for discovery. Argentina Br. in Opp. 8, 9 (citing Pet. App. 62a). The very appendix page cited shows the exact opposite. Counsel for EM stated to the district judge (Pet. App. 62a (emphasis added)):

> [S]hould you feel that there are – that you can't confirm it now, perhaps because there are some factual issues about some of the statements made by Argentina, then we should be entitled to discovery to learn more about the effect of the decree, the central bank functions, what Argentina plans to

> do with additional freely available reserves as they come up, the purposes of the funds.
>
> * * * * *
>
> They have made certain factual statements in their declarations with which we completely disagree * * *. If you would like to later, we can talk about the specific discovery issues, but we don't think discovery is needed in order to *confirm* the attachments at this time.

5. Respondents finally seek to defend the judgment below on a ground that the Second Circuit did not reach and that is not raised by the certiorari petition. BCRA Br. in Opp. 26-27. Respondents argue that the FRBNY funds are immune from attachment because they are "held for" the Central Bank's "own account" within the meaning of 28 U.S.C. § 1611(b)(1).

It is certainly open to a respondent to *argue* alternative grounds in support of a judgment below, but this Court has discretion whether to reach those issues or leave them to the lower courts on remand. See, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 823 (2007); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 469-470 (1999); *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam). Here, it would make sense to grant certiorari and resolve the questions presented by the petition. Only if this Court resolves in petitioners' favor the question whether the FRBNY funds were property of Argentina used for a commercial activity will there be a remand. A holding by this Court favorable to petitioners on that question would severely undermine any basis for concluding that those funds were held by the Central Bank "for its own account."[4]

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[4] Section 1611(b)(1) immunity "applies to * * * funds used or held in connection with central banking activities, *as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states*." H.R. REP. 94-1487, at 31, *reprinted in* 1976 USCCAN at 6630 (emphasis added). To resolve in petitioners' favor the questions presented by the petition would place the FRBNY funds in the category the House Report described as the *opposite* of funds held for a central bank's own account.

This is not, then, a case where "the decision below is correct regardless of how the Court resolves the questions presented." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.37(a), at 457 (8th ed. 2002).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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